MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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Reconciling Proportionality with Reasonableness:
The Adjudication of Retrogression-related Complaints under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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Abstract: With the entry into force of the Optional Protocol to the International Covenant on Economic, Social and Cultural rights in 2013, a growing bulk of literature is focusing on how, not whether, socioeconomic rights should be enforced. A largely unresolved question in this regard, is how the Committee on Economic Social and Cultural Rights should purport to adjudicate individual complaints involving retrogressive measures, defined by scholars as backwards steps in the level of protection accorded to the Covenant rights as a consequence of an intentional decision by a State Party. The question is particularly relevant since, in contrast to the other complaint mechanisms of the United Nations human rights treaty system, the Optional Protocol contains an express standard of review – the 'reasonableness review' – as provided by article 8 (4).

Among the challenges relating to the adjudication of retrogression-related complaints, is the unclear relationship between retrogressive measures on the one hand and formal limitations on the other. Indeed, while the Covenant contains a general limitations clause as set in article 4, the Committee has developed a doctrine on non-retrogression, in the light of which most active state interferences are reviewed. The doctrine is understood to mirror the concept of progressive realization contained in article 2 (1), since, by undertaking to progressively realize the Covenant rights, states simultaneously undertake not to reduce already achieved levels of access to them.

After having sought to clarify the normative content of the concept of non-retrogression, the thesis draws attention to the judicial enforcement of retrogression-related complaints. In the light of considerations of distributive justice, it is argued that the concept of non-retrogression should not be interpreted and applied in an excessively rigorous manner. This, particularly since a rigorous enforcement of the concept might obstruct the possibilities by states to redistribute resources to marginalized groups of society.

The thesis is concluded with three main findings. First, that because retrogressive measures in terms of article 2(1) and limitations in terms of article 4 share significant similarities, they should not be treated differently, but instead reviewed under a single standard set by the general limitations clause. Second, that the concept of non-retrogression, designed for the purpose of monitoring result-based realization over the population as a whole, should not be applied in the context of individual contentious processes. And finally, that a standard of 'reasonableness-inflected proportionality', by reflecting the respective strengths of reasonableness and proportionality, might provide the answer for a socially just adjudication of active retrogression-related complaints under the Optional Protocol.

Key words:
Economic, social and cultural rights, judicial enforcement, retrogressive measures, limitations, the concept of non-retrogression, standard of review, reasonableness review, proportionality analysis, distributive justice.

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Table of content

1. Introduction

1.1. Background

On 5 May 2013 – nearly four decades after the entry into force of its civil and political counterpart – the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR or the Optional Protocol) entered into force.[1] As such, it finally allowed the Committee on Economic Social and Cultural Rights (CESCR or the Committee) to consider complaints by individuals and groups of alleged violations of the economic, social and cultural (socioeconomic) rights recognized by the International Covenant on Economic, Social and Cultural Rights (ICESCR or the Covenant).[2] Ending the historic imbalance in the international protection of civil and political rights on the one hand, and socioeconomic rights on the other, the entry into force of the Optional Protocol thus reinforced the understanding of human rights as truly "universal, indivisible and interdependent".[3] Against this background, the important question is no longer whether, but how, socioeconomic rights should be enforced.[4]

While the Committee has sought to clarify the content of the majority of the obligations flowing from the Covenant rights, only little attention has been paid towards the question of legitimate limitations. It is for instance notable that although the ICESCR contains a general limitations clause as set forth in article 4, it is rarely applied in practice. Rather, the Committee seems to have developed a doctrine on non-retrogression, understood as the "natural corollary" to the concept of progressive realization as contained in article 2 (1) of the Covenant.[5] According to that provision, each State Party "undertakes to take steps…to the maximum of its resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means". The concept of non-retrogression thus follows from the understanding that State Parties,

1 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR-OP), 10 December 2008, UN doc. A/RES/63/117.
2 International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), 16 December 1966, 993 UNTS 3.
3 Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993, UN doc. A/CONF.157/23, para. 5.
4 South African Constitutional Court, *Grootboom and Others v. The Government of the Republic of South Africa and Others* (2000) (hereinafter *Grootboom*), judgement of 4 May 2000, CCT 11/00, para. 20.
5 Nolan, Lusiani and Courtis (hereinafter Nolan et. al.), 2014, p. 123.

by undertaking to progressively realize the Covenant rights, simultaneously undertake not to reduce already achieved levels of access to them.[6]

Despite the central role of the concept of non-retrogression, it suffers from a lack of a clear normative content to guide its interpretation and application. Most notably, the Committee has refrained from addressing a number of crucial questions such as the actual meaning of 'retrogressive measures'; the precise circumstances under which such measures may be considered justifiable; whether compliance should be measured in light of a particular individual or groups of individuals, or in light of the population as a whole; as well as the relationship, if any, between retrogressive measures and limitations in terms of the general limitations clause. Such ambiguity is reflected, for instance, by the varying reference to it by scholars as both a 'prohibition',[7] 'principle',[8] and an 'escape-hatch'[9]. Arguably, therefore, the nebulous scope of the concept poses a challenge for the adjudication of retrogression-related complaints under the Optional Protocol.

While it is suggested by many scholars that the main purpose of socioeconomic rights is to transform societies into being more socially just,[10] particularly in developing countries by facilitating the access to rights by poorest members of society,[11] increasing evidence points towards a gap between theory and practice; instead of focusing exclusively or even primarily on the marginalized, the main beneficiaries of the enforcement of socioeconomic rights belong to middle- or higher income groups of society.[12] One explanation to the above may lie with an overly rigorous application of the concept of non-retrogression. Indeed, by "locking in" already achieved levels of access to rights by particular individuals or groups, it might risk obstructing governments' broader aims of achieving a more equitable distribution of resources.[13] With this in mind, a question of

6 This is implied by the fact that the concept of non-retrogression was introduced in conjunction with the concept of progressive realization, see UN Committee on Economic, Social and Cultural Rights (hereinafter CESCR), General Comment No. 3: The Nature of State Parties' Obligations, 14 December 1990, E/1991/23, para. 9.
7 See *e.g.*, Nolan et. al., 2014, Kirvesniemi. 2015.
8 See *e.g.* Warwick, 2016, p. 254, Landau, 2012, p. 220.
9 Wills & Warwick, 2016, p. 10.
10 Much of the scholarship on the transformative purpose of socioeconomic rights, particularly in the South African context, is based on the work of Karl E Klare. See further, chapter 4.4.1.
11 Landau & Dixon, 2019, p. 110.
12 *Ibid.,* p. 111.
13 See *e.g.,* Landau, 2012, pp. 231-235.

particular importance is whether the concepts of progressivity/non-retrogression – designed originally for monitoring purposes in the context of state reporting processes – are appropriate yardsticks when adjudicating complaints under the Optional Protocol.[14]

In finding a fair balance between the rights of the individual and the population as a whole, the choice of review standard applied by judicial and quasi-judicial bodies when assessing alleged violations may play a pivotal role. The question of how the Committee applies such standards in a given case, particularly in relation to retrogression-related complaints, is, however, largely unresolved. In this context, two standards of review are of particular interest: first, a standard based on proportionality, often referred to as the 'proportionality analysis',[15] and second, a standard based on reasonableness, in turn known as the 'reasonableness review'.[16] Importantly, the latter is provided by article 8 (4) of the Optional Protocol, thereby constituting the first complaint mechanism of a core human rights treaty to provide for an express standard of review for the assessment of alleged violations.[17] In accordance with said provision, the Committee is mandated to consider the reasonableness of the steps taken by State Parties – both forwards and back.

There are nevertheless reasons to examine the question further. In general terms, namely, the choice of review follows certain underlying factors, *inter alia*, the nature of the relevant obligation under assessment.[18] Hence, whereas the reasonableness review is applied mainly in relation to alleged violations by states involving a failure to adopt active measures in order to *protect* and *fulfil* the relevant rights, in contrast, the proportionality analysis is applied mainly in relation to alleged infringements by the state to *respect* the rights in question. While socioeconomic rights admittedly give rise to the obligations of protect and fulfil more frequently than their civil and political counterparts, in terms of the ICESCR, however, the concept of non-retrogression shares notable similarities with the obligation to respect.[19] It is therefore unclear whether the two concepts – the

14 Melish, 2005, pp. 60-64.
15 See generally *e.g.,* Alexy, 2002, Möller, 2012.
16 See generally *e.g.* Liebenberg, 2010, Young, 2017.
17 Griffey, 2011, p. 277.
18 See *e.*g., Liebenberg 2010, pp. 54, 218, Young 2010, p. 413.
19 O'Connell, Nolan, Harvey, Dutschke and Rooney (hereinafter O'Connell et al), 2014, p. 92.

obligation not to take retrogressive measures, and the obligation to respect – might in fact be viewed as commensurate and thus reviewed under a unified approach.

It is furthermore noteworthy that regardless of their differing methodologies, both the proportionality analysis and the reasonableness review involve considerations of weight and balance. Indeed, while the structured test of proportionality does not appear to have found its way into the enforcement of socioeconomic rights, proportionality as a *principle* is understood as an integral part of reasonableness.[20] A logical consequence of the above is their rejection of more absolutist standards, in particular the minimum core.[21] Important questions nevertheless remain as to the relationship between proportionality and reasonableness, particularly in the context of adjudicating retrogression-related complaints under the Optional Protocol.

1.2. Research questions and structure

In light of the above, the purpose of the present thesis is to examine how the Committee should purport to adjudicate complaints involving retrogressive measures under the Optional Protocol. The topic will be examined in light of two main research questions:

> *1) What is the content and scope of the concept of non-retrogression? In particular, what are the criteria against which compliance is measured?*
>
> *2) What standard of review should the Committee apply when assessing retrogression-related complaints under the Optional Protocol?*

Although the latter question is undoubtedly the main focus of this thesis, it cannot be answered without first having examined the former. It is thus necessary to begin by examining the legal nature of socioeconomic rights in general, and the concept of non-retrogression in particular, before addressing how the Committee might assess retrogression-related complaints under the Optional Protocol. In considering the latter question, I will examine three sub-questions: first, whether retrogressive measures and

[20] Young, 2017, p. 13.
[21] See *e.g.* Young, 2008, pp. 140, 169.

limitations may be considered as commensurate, and thus reviewed under a unified standard. Second, whether the concepts of progressivity/non-retrogression may automatically be transferred from state reporting processes to the individual communications procedure. And third, whether, and if so how, the Committee should purport to reconcile the standards of reasonableness and proportionality when adjudicating retrogression-related complaints under the Optional Protocol.

The thesis is divided into five main chapters. After this introduction, in chapter two, I will examine the state obligations flowing from the general obligations provisions of the ICESCR, particularly articles 2 (1) and 4. This will provide the reader with a general background on socioeconomic rights law, upon which later parts of the thesis build. Having considered some of the reasons behind the Committee's apparent difficulties in defining the content and scope of the concept of non-retrogression, chapter three is continued by considering how the Committee has sought to develop the concept in more detail. In particular, I will examine *when* retrogressive measures may be considered justifiable. Finally, it is examined whether compliance should be measured in light of a particular individual or group of individuals, or in relation to the population as a whole.

Whereas the aim of the first two substantive chapters is to clarify the nature of the state obligations flowing from the Covenant, the final two chapters are devoted to questions relating to their adjudication. Accordingly, in chapter four, I will examine questions relating to court postures, standards of review and distributive justice. The applicable standards of review will furthermore be examined and juxtaposed. Against the background of the potentials and pitfalls of the relevant standards, in the final chapter of this thesis, I will examine how the Committee should approach individual complaints involving retrogressive measures. The chapter is divided into three subchapters, in which the three sub-questions as presented above (concerning question two), are examined respectively. Finally, in light of the purportedly transformative purpose of socioeconomic rights enforcement, I attempt to determine a new, hybrid standard of review to guide the Committee in adjudicating retrogression-related complaints under the Optional Protocol.

1.3. Material and method

I aim to answer the research questions by way of examining the sources of international law, as set forth by article 38 (1) of the Statute of the International Court of Justice.[22] It lists the following sources:

> a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b) international custom, as evidence of a general practice accepted as law;
> c) the general principles of law recognized by civilized nations;
> d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

For the purpose of this thesis, the provisions of the ICESCR and the OP-ICESCR are of particular interest. These are especially articles 2 (1) and 4 of the ICESCR, and article 8 (4) of the Optional Protocol. Said provisions will be examined in light of the general rules of interpretation, as provided by article 31 of the Vienna Convention on the Law of Treaties (VCLT).[23] Particular focus will be given to the practice of the CESCR; the international body of 18 experts charged to supervise the implementation of the Covenant. Most notably, I will examine its general comments, viewed to reflect the State Parties' agreement on the interpretation of the ICESCR, and thereby constituting subsequent practice in terms of article 31(3)(b) of the VCLT.[24] As such, the general comments issued by the Committee may be considered to represent the most authoritative interpretations of the Covenant provisions.[25]

In order to shed light on the circumstances under which retrogressive measures may be considered justifiable, two further documents are of particular interest: first, a statement by the Committee clarifying how it might proceed when considering alleged violations under the Optional Protocol,[26] and second, a 2012 letter issued by the Chairperson of the

22 Statute of the International Court of Justice, 24 October 1945, 33 UNTS 993.
23 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.
24 General comments may moreover contribute to the formation of customary international law by the shaping of *opinio juris* and state practice, see Mechlem, 2009, pp. 920, 930.
25 Scheinin, 1997, p. 444.
26 CESCR, an evaluation of the obligation to take steps to the "maximum of available resources" under an Optional Protocol to the Covenant, 10 May 2007, UN Doc. E/C.12/2007/1.

Committee concerning "the protection of Covenant rights in the context of the economic and financial crisis".[27] Despite not being legal sources in terms of the traditional sources of international law as described above, they are repeatedly referred to by the Committee, and might thereby develop into assuming legal weight.[28] It is moreover noteworthy that while the Committee's approach to non-retrogression might not be identical for purposes of monitoring vis-à-vis adjudication, its concluding observations, general comments and other statements may provide for important guidance on how it might consider the state obligations flowing from the Covenant when adjudicating complaints under the Optional Protocol.[29]

Once the focus of the thesis is shifted towards the judicial enforcement of the Covenant rights, jurisprudence in the form of decisions by international, regional, and national judicial and quasi-judicial bodies will provide for valuable interpretative aid. As such, the jurisprudence of the Constitutional Court of South Africa (SACC) is given particular weight, since, as will be examined below, it contributed significantly to the drafting of the Optional Protocol. The *travaux preparatoires* of the Covenant will moreover be examined as a supplementary means of interpretation when determining the relationship between retrogressive measures and formal limitations. Finally, as an invaluable, albeit subsidiary source of law, the work of socioeconomic scholars will be used throughout the thesis.

[27] Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights.
[28] For an overview on the concept of soft law, see generally Thürer, 2013.
[29] Indeed, this is indicated by the Committee in its 2007 statement, para. 2.

2. The nature of state obligations in relation to socioeconomic rights

2.1. Three typologies of socioeconomic rights

2.1.1. The ICESCR, ICCPR, and the legal nature of socioeconomic rights obligations

In order to answer the question of how the concept of non-retrogression should be interpreted and applied, one must first have a primary understanding of the underlying obligations flowing from the ICESCR. Most notably, whereas civil and political rights are characterized as entailing primarily negative obligations, and thus requiring the state to abstain from interfering with such rights, socioeconomic rights are described as entailing mainly positive obligations, thus requiring positive action by the state, without which they cannot be realized. By analogy, and in contrast to civil and political rights, socioeconomic rights have been regarded as relatively resource-intensive, capable of realization only in the long term.[30] This perceived difference between the two sets of rights is arguably the most commonly raised argument concerning the alleged non-justiciability of socioeconomic rights.[31] Importantly, however, although socioeconomic rights may require relatively greater involvement by the state, civil and political rights too, require positive action for their realization.[32]

In line with the above, socioeconomic rights similarly impose obligations "traditionally" associated with the obligations flowing from the International Covenant on Civil and Political Rights (ICCPR),[33] *i.e.* obligations of negative and immediate nature.[34] As will be discussed in more detail below, negative obligations are particularly relevant in relation to the main subject of this thesis: the concept of non-retrogression.[35] Importantly therefore, all human rights, whether civil, cultural, economic, political or social, give rise to a variety of state obligations, regardless of the Covenant they stem from. In order to

30 Alston & Quinn, 1987, p. 159, Sepúlveda 2003, p. 3.
31 Bilchitz, 2014, p. 714.
32 It would for instance be difficult to argue that the right to a fair trial could be realized without any positive state action ensuring that there is a functioning judicial system in place, see Alston & Quinn 1987, p. 184.
33 International Covenant on Civil and Political Rights (hereinafter ICCPR), 16 December 1966, 993 UNTS 3.
34 Sepúlveda, 2003, p. 14.
35 The question of whether the obligation not to take retrogressive measures is of immediate nature would appear to require further research. One scholar arguing that it is, indeed, of immediate nature is Aoife Nolan, noting that "because the prohibition of taking retrogressive steps applies to existing measures of implementation of ESR, it has to be of effect immediately, in order to provide effective protection". See Nolan, 2014, p. 64.

de-emphasize the at least partly artificial conceptual distinction between the nature of civil and political rights on the one hand, and socioeconomic rights on the other, the obligations flowing from the ICESCR are often analysed in light of the 'tripartite typology' of respect, protect and fulfil.[36] This framework, examined more in detail below, is particularly useful by being mutually applicable to all human rights, thus highlighting their indivisibility.[37]

2.1.2. The 'tripartite typology' of rights

The first obligation of the tripartite typology, the obligation to respect, imposes a duty upon states to refrain from interfering with existing levels of access to rights.[38] In terms of the ICESCR, the obligation to respect requires states not to interfere with the enjoyment of economic, social and cultural rights.[39] For instance, it entails that states should abstain from carrying out forced evictions without guarantees of alternative housing.[40] As will be examined in subsequent chapters, it correlates closely with the duty not to take retrogressive measures, *i.e.* the concept of non-retrogression.[41] While in most cases entailing an obligation to refrain from certain action, and thus understood as the least resource-intensive obligation, [42] it may also require states to take positive action in order to ensure that existing levels of rights are maintained.[43] This is particularly relevant in order to ensure a continued access to rights by disadvantaged members of society, especially in times of severe resource constraints.[44]

[36] Eide 1984, p. 154. The tripartite typology was originally elaborated by Shue in 1980, where his proposal included the obligations "to avoid depriving", "to protect from deprivation" and "to aid the deprived", see further, Shue 1980, p. 52.
[37] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, 25 June 1993, UN doc. A/CONF.157/23, at para. 5.
[38] Nolan & Dutschke 2010, p. 3, Bilchitz, 2014, p. 715.
[39] The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (hereinafter the Maastricht guidelines), 1998, para. 6.
[40] See e.g. CESCR, *Djazia and Bellini v. Spain*, Communication No. 5/2015, paras. 15.1-5; CESCR General Comment No. 7 The right to adequate housing (Art. 11.1): forced evictions, 20 May 1997, E/1998/22, para. 17.
[41] See further, chapter 5.1.
[42] Riedel 2012, p. 135.
[43] Nolan & Dutschke, 2010, p. 3.
[44] O'Connell et. al., 2014, p. 91.

The second obligation requires states to protect the rights of individuals from third party interference.[45] While not having adopted the tripartite typology, the European Committee on Social Rights (ECSR) has dealt with the obligation to protect by noting that it will be authorized to consider cases "even if the state has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator".[46] The obligation to protect has similarly been addressed by the CESCR, for instance in relation to the right to the highest attainable standard of health, by stating that it requires states to adopt legislation ensuring equal access to health care; to ensure that privatization does not threaten the proper functioning of health facilities, goods and services; and that medical practitioners meet appropriate standards of education, skill and ethics.[47] In relation to the right to water, the Committee has moreover noted that in order to ensure that an equal, affordable, and physical access to sufficient, safe and acceptable water is not compromised, states are required to establish regulatory systems that include independent monitoring and genuine public participation, as well as the imposition of penalties in the case of non-compliance.[48] The obligation to protect thus requires states to establish effective systems of regulation, monitoring and deterrence, in order to "prevent, punish and remedy violations committed by third parties".[49]

More than the other two types of obligations, the obligation to fulfil is described as requiring an active role by the state in the form of legislative, administrative, judicial, budgetary and other measures.[50] In addition to being viewed as the most resource-dependent obligation, the obligation to fulfil often raises most questions concerning its content and scope.[51] This might not be fully coincidental, since, as argued by Koch, resource-demanding obligations are often followed by vague definitions.[52] The open-endedness of the obligation to fulfil might be beneficial by allowing states to respond as

45 *Ibid.,* pp. 92-97, Wills & Warwick 2016, p. 13.
46 European Committee on Social Rights (hereinafter ECSR), *Marangupolous Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, decision on admissibility, 30 October 2005, para. 14.
47 CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, 11 August 2000, E/C.12/2000/4, para. 35.
48 CESCR, General Comment No. 15: The Right to Water, 20 January 2003, E/C.12/2002/11, para 24.
49 O'Connell et al, 2014, p. 95, citing Nolan, 2009, p. 251.
50 Riedel, 2012, p. 135.
51 O'Connell et al, 2014, pp. 97-102.
52 Koch, 2003, p. 12.

necessary in accordance with the circumstances at hand. Some guidance to its content may nevertheless be drawn from the general comments of the CESCR.

Indeed, in relation to the right to health the Committee has stated that "[v]iolations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health".[53] Such violations may occur by a variety of ways, for example through the failure to adopt a national policy on how the relevant right should be realized; insufficient expenditure or misallocation of public resources that lead to the non-enjoyment of the right; the failure to monitor the realization of the right at the national level, for example by identifying indicators and benchmarks; and the failure to take measures to reduce the inequitable distribution of resources.[54] The obligation to fulfil has moreover been divided into the obligations to facilitate, promote and provide, referred to by the Committee in various general comments.[55] The obligation to facilitate requires states to "proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood".[56] The obligation to promote requires states to undertake a number of measures in order to "create, maintain and restore" access to rights.[57] Finally, whenever an individual or group is unable to realise a right on their own (for grounds reasonably considered beyond their control) the obligation to provide requires states to realize that right directly.[58]

While the tripartite typology is primarily a conceptual tool elaborated by scholars, it is widely applied by the Committee, and has provided states with important guidance on how to implement their duties.[59] The division of state obligations to respect, protect and fulfil has furthermore furthered the avoidance of a two-dimensional understanding of

53 CESCR, General Comment No. 14, para. 52.
54 *Ibid.*
55 CESCR, General Comment No 19: The Right to Social Security, 4 February 2008, E/C.12/GC/19, paras. 47-50; CESCR, General Comment No. 15, para. 25; CESCR, General Comment No. 14, para 37.
56 CESCR, General Comment No. 12: The Right to Adequate Food, E/C.12/1999/5, para. 15.
57 Nolan & Dutschke, 2010, p. 3. Such measures might, for instance, include research; the provision of information; and by ensuring that authorities are trained to recognize the needs of particularly disadvantaged groups of society, see General Comment No. 14, para. 37.
58 In relation to the right to social security, for example, states are required to create non-contributory schemes for the protection individuals and groups who are unable to make sufficient contributions to fulfil their right to social security on their own, see CESCR, General Comment No. 19: The Right to Social Security, 4 February 2008, E/C.12/GC/19, para. 50; CESCR, General Comment No. 12, para. 15.
59 Griffey, 2011, p. 289.

human rights obligations, based on the covenant they stem from.[60] Importantly, therefore, the tripartite typology demonstrates that socioeconomic rights implicate a full range of obligations, requiring states both to refrain from infringing existing levels of access to rights, as well as to take action in order to ensure that they are protected and fulfilled. As will be examined in subsequent chapters, the tripartite typology may provide an important tool for the Committee when deciding upon the permissibility of retrogressive measures under the Optional Protocol.

2.1.3. Obligations of conduct and obligations of result

A final noteworthy framework when analysing the obligations stemming from the ICESCR, is the division of obligations into what the International Law Commission (ILC) has termed 'obligations of conduct' and 'obligations of result'.[61] Whereas the former obliges states to undertake certain measures in pursuit of a given result, the latter one obliges states to achieve a certain outcome, irrespective of the form of conduct.[62] Except for the elementary, but arguably vague obligation "to take steps" as contained in article 2 (1) of the Covenant,[63] the Covenant is argued not to impose specific obligations of result.[64] Both dimensions nevertheless apply mutually to all human rights and form an inseparable understanding of how the state obligations under the Covenant should be viewed.[65] Accordingly, the tripartite obligations of respect, protect and fulfil, respectively, consist of both obligations of conduct and obligations of result.[66]

2.2. Article 2(1) ICESCR: a general starting point

2.2.1. The concept of progressive realization

Much of the present confusion over the normative content of the concept of non-retrogression is arguably attributable to article 2(1), one of the most central obligations-related provisions of the Covenant.[67] In contrast to rights-based obligations, reflecting

60 Griffey, 2011, p. 289.
61 International Law Commission (ILC), Draft Articles on State Responsibility with commentaries thereto adopted by the International Law Commission on first reading, January 1997, articles 20 and 21.
62 *Ibid.*
63 CESCR, General Comment No. 3, para. 2.
64 De Schutter, 2019, p. 565.
65 Leckie, 1998, p. 92.
66 The Maastricht Guidelines, 1998, para. 7.
67 Sepúlveda, 2003, p. 16.

the direct enjoyment by individuals of specific rights, article 2(1) spells out the nature of the general legal obligations undertaken by State Parties in relation to the Covenant as a whole.[68] Article 2(1) thus establishes the way in which they much behave in order to respect, protect and to fulfil the substantive rights of the Covenant.[69] It reads as following:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Essentially, the concept of progressive realization imposes a duty to take appropriate measures, to the maximum of available resources, in order to achieve the full realization of the Covenant rights. The reference to the availability of resources is inherently a recognition of the varying levels of development and resources available to different states, against which the expectations and obligations of the ICESCR will be measured.[70] While the above implies that the full realization of the Covenant rights may not be possible immediately, states are nevertheless obliged to demonstrate that actual progress is made in the enjoyment of rights.[71]

Available resources must moreover be optimally prioritized and used in an increasingly effective manner.[72] The need to optimize the use of resources is particularly important during times of severe resource constraints, such as armed conflicts or economic crises. In such circumstances, states are under an heightened obligation to protect marginalized groups of society,[73] for example through the provision of low-cost targeted programmes,[74] and by ensuring that policies and legislation are not "designed to benefit

[68] CESCR, General Comment No. 3, para. 9.
[69] Sepúlveda, 2003, p. 16.
[70] Chapman, 1996, pp. 23,38.
[71] O'Connell et al., 2014, p. 67.
[72] Eide, 2000, p.126. See further, chapter 3.3.2.
[73] Griffey, 2011, p. 282.
[74] CESCR, General Comment No. 3, para. 12; CESCR, General Comment No. 5: Persons with Disabilities, 9 December 1994, E/1995/22, para. 10; CESCR, General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, 8 December 1995, E/1996/22, para. 17.

already advantaged social groups at the expense of others".[75] Moreover, the concept of progressive realization is argued to impose not only a duty to expand the access to rights, but also to improve their implementation. Rights should thus be made available to both a larger *number* and a wider *range* of people.[76]

In addition to article 2(1) of the ICESCR, the obligation of progressive realization is recognized by the Convention on the Rights of the Child (CRC),[77] as well as the Convention on the Rights of Persons with Disabilities (CRPD).[78] At the regional level, progressive realization is recognized by article 26 of the American Convention on Human Rights,[79] and is suggested to be implied by articles 61 and 62 of the African Charter on Human and Peoples' Rights.[80] Similarly, while progressive realization is not recognized expressly in a general obligations-related provision by the European Social Charter (ESC),[81] the jurisprudence of the ECSR suggests that it is implicit therein.[82] It is moreover provided in relation to social security in article 12(3) of the ESC.

As is well-known, the wording of article 2(1) of the ICESCR differs significantly from the wording of article 2(1) in its sister Covenant: whereas the ICESCR imposes the duty to progressively realize the Covenant rights, the ICCPR imposes a duty to "respect and to ensure" the rights therein.[83] While the difference in wording reflects a recognition of the varying levels of available resources to states, and thus a rejection of a uniform set

75 CESCR, General Comment No. 4: The Right to Adequate Housing, 13 December 1991, E/1992/23, para. 11.
76 Liebenberg, 2001, pp. 232, 241, See also *Grootboom,* para. 45.
77 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, art. 4.
78 Convention on the Rights of Persons with Disabilities, 13 December 2006, 2515 UNTS 3, art. 4(2).
79 American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36, art. 4 (2).
80 African Charter on Human and Peoples' Rights, 1 June 1981, OAU No. 26363. See further, African Commission on Human and Peoples' Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2011, para. 14.
81 European Social Charter (hereinafter ESC), 18 October 1961, ETS no. 035.
82 Such an understanding is supported by *Autisme-Europe v. France,* for instance, where the Committee found France to have violated the right to integration and education of persons with disabilities, by failing to take adequate measures to increase the education of persons with autism compared to other persons. The Committee noted that even in situations where the achievement of a right would be particularly expensive or complex, states must take measures "within a reasonable time with measurable progress and to an extent consistent with the maximum use of available resources" in order to realize the objectives of the Charter, See ECSR, International Association Autism-Europe v. France, Collective Complaint No. 13/2002, decided on the merits, 4 November 2003, para. 53.
83 ICCPR, article 2(1).

of obligations flowing from the ICESCR, the relatively vague language of article 2(1) ICESCR has arguably contributed to the treatment of socioeconomic rights as aspirations rather than fully-fledged rights.[84] Nevertheless, due to the recognition of socioeconomic rights in a broad range of human rights instruments during the last three decades and the entry into force of the OP-ICESCR, today, their status as real, justiciable rights is beyond dispute.

Even though the concept of progressive realization is in many respects the cornerstone of the Covenant, its meaning should not be overstated. In particular, the Covenant also imposes a number of obligations of *immediate* effect.[85] As has been noted by the Committee, the obligation of 'taking steps' is in itself of immediate nature.[86] Such steps must be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant".[87] Moreover, in terms of substantive obligations, states have to ensure immediately the enjoyment of all rights without discrimination,[88] and the access of everyone to minimum essential levels of each right.[89] Importantly, states also have a number of immediate duties in terms of procedural nature, including: the adoption of a national action plan and placing it under regular monitoring;[90] ensuring the participation of relevant stake-holders in decision-making;[91] and, establishing accountability mechanisms and providing for remedies in the event of violations.[92]

By recognizing the ability of states to progressively develop the Covenant rights in order to achieve their full realization over time, article 2(1) can be understood to involve two main elements. As noted by the Committee, it is on the one hand "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any

84 See *e.g.* Chapman, 1996, p. 39, Warwick and Wills, 2016, pp. 7-8.
85 CESCR, General Comment No. 3, para 1, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, 1986, principle 22.
86 CESCR, General Comment No. 3, para. 1.
87 *Ibid.,* para. 2
88 *Ibid.,* para. 1
89 *Ibid.,* para 10. See further, chapter 3.3.4.
90 CESCR, General Comment No. 14, para. 43(f).
91 Office of the United Nations High Commissioner for Human Rigths (OHCHR), Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights, 8 June 2009, UN Doc. E/2009/100, para. 33.
92 *Ibid.*

country in ensuring full realization of economic, social and cultural rights".[93] As examined above, this would appear to reflect the varying possibilities of states to realize the Covenant rights at a set pace. Interpreting the notion of progressive realization too loosely, so as to postpone the realization of the rights to an indefinite future, would, however, be to deprive the obligation of all meaningful content. On the other hand, therefore, the notion of progressive realization must be read in light of the object and purpose of the ICESCR: the establishment of clear obligations in order to reach the full achievement of all the rights recognized therein.[94] In combination with the immediate obligation of taking concrete, deliberate and targeted steps, State Parties are thus obliged to move as expeditiously and effectively as possible towards that goal.[95] As has been stated by Nolan and Dutschke, progressive realization is thus essentially a means to an end.[96]

Of the above follows, that article 2 (1) may be understood to involve an obligation of *advancing* the broader coverage and enjoyment of socioeconomic rights over time.[97] From such an "obligation of advancement" follows, that when a state undertakes to improve and expand the protection and coverage of the Covenant rights, it simultaneously undertakes not to reduce already achieved levels of access to them.[98] Implicit in the obligation of taking steps to progressively realize socioeconomic rights, is thus the concept of non-retrogression.

2.2.2. The concept of non-retrogression as a corollary to progressive realization

The concept of non-retrogression was first introduced by the Committee in its general comment No. 3, the attempt of which was to outline the various obligations imposed by article 2(1). It may thus be understood as the "natural corollary" to the concept of progressive realization.[99] According to the Committee:

93 CESCR, General Comment No. 3, para. 9.
94 *Ibid.,*
95 *Ibid.,*
96 Nolan & Dutschke, 2010, p. 2.
97 Nolan et al., 2014, p. 123.
98 *Ibid.*
99 *Ibid.*

> …any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[100]

Of the above follows, that there is a presumption against the permissibility of 'deliberately retrogressive measures'.[101] Regrettably, however the Committee has not provided for any proper definition over how retrogressive measures should understood. Neither has the Committee attempted to define the difference between deliberate and other retrogressive measures.[102] Some guidance may nevertheless be derived from the Committee's General Comment No. 4, which, albeit without mentioning the term 'retrogressive measures', states that:

> …a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.[103]

In interpreting the above statement, Sepúlveda has defined the meaning of a 'deliberately retrogressive measure' as: "any measure that implies a step back in the level of protection accorded to the rights contained in the Covenant which is the consequence of an intentional decision by the State".[104] In concrete terms, retrogressive measures might include the adoption of legislation or a policy reducing the access to socioeconomic rights or public expenditure, *e.g.* in the form of cuts to social benefits or services such as basic health care and primary education.[105] The Committee's arguably most far-reaching exemplification of the actual meaning of a retrogressive measure may be found in General Comment No. 22 on the right to sexual and reproductive health, in which it lists the following examples of retrogressive measures:

a) the removal of sexual and reproductive health medications from national drug registries;
b) laws or policies revoking public health funding for sexual and reproductive health services;

100 CESCR; General Comment No. 3, para. 9.
101 Sepúlveda. 2014, p. 27.
102 *Ibid.,* p. 133.
103 CESCR, general comment No. 4, para. 11.
104 Sepúlveda, 2003, p. 323.
105 Sepúlveda, 2014, p. 27.

c) imposition of barriers to information, goods and services relating to sexual and reproductive health;
d) enacting laws criminalizing certain sexual and reproductive health conduct and decisions; and,
e) legal and policy changes that reduce oversight by States of the obligation of private actors to respect the right of individuals to access sexual and reproductive health services[106]

Importantly, as noted by Langford and King, the concept of non-retrogression does not impose an absolute bar to measures restricting the access to socioeconomic rights of particular individuals or groups; rather, such measures are reviewed under "a particularly strong form of scrutiny" and require a "high level of justification".[107] Indeed, by noting that article 2(1) should be interpreted as a flexibility device, reflecting the realities of the real world,[108] the Committee thus appears to imply that retrogressive measures may be justifiable in at least some circumstances. With that said, the Committee has been argued to equate retrogressive measures with *prima facie* violations of the Covenant; hence, where such measures are demonstrated to have taken place, the burden of proof would shift to the state to justify its conduct.[109] The important question to be answered is thus *when* such backsliding will be permissible. Before turning to said question, however, it is worth to first examine the general limitations clause of the Covenant.

2.3. The general limitations clause: a brief overview

Set forth in article 4 of the Covenant, the general limitations clause provides for the circumstances under which the Covenant rights may be subjected to limitations. It reads as following:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

106 CESCR, General Comment No. 22 on the right to sexual and reproductive health, 2 May 2016, E/C.12/GC/22, para. 38.
107 Langford & King, 2009, p. 502.
108 CESCR, General Comment No. 3, para. 9.
109 Nolan et. al., 2014, p. 124.

In order for a limitation to be compliant with article 4, it must therefore satisfy three essential safeguards.[110] The first safeguard obliges states to ensure that any limitation be "determined by law". In terms of formal requirements, the limitation must be provided by generally applicable national law compatible with the Covenant,[111] in force at the time when the limitation was applied.[112] Importantly, "law" is not understood as statute law exclusively, but may also encompass unwritten law.[113] Further, the national provision imposing the limitation is required to be adequately accessible, *i.e.* publicly available, in a sufficiently precise form, so that individuals can foresee the consequences of their conduct, and regulate their conduct accordingly.[114] Finally, in terms of substantive requirements, the Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles), adopted in 1986 by a group of distinguished experts in international law, state that national laws imposing limitations may not be arbitrary, unreasonable or discriminatory.[115]

The second safeguard requires that any limitation be compatible "with the nature of these [economic, social and cultural] rights". The interpretative difficulties relating to the phrase are linked not only to its seemingly vague formulation, the lack of consideration by the Committee, but also because no similar phrasing is included in other human rights instruments. It is thus unclear how exactly the 'nature' of socioeconomic rights should be understood. Some scholars argue that it reflects the concept of the minimum core content of rights,[116] as examined further in chapter 3.3.4,

[110] ICESCR, article 4. Due to the Committee's limited interpretation of article 4, including the safeguards therein, interpretative aid will be drawn from the Limburg principles and the practice of other human rights treaty bodies.
[111] CESCR, General Comment No 15: The Right to Water, 20 January 2003, E/C.12/2002/11, para 56.
[112] See e.g., The Limburg Principles, principle 48, Human Rights Committee (HRC), CCPR General Comment N. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, 27 July 1990, para. 4.
[113] European Court of Human Rights (hereinafter ECtHR), *Sunday Times v. UK*, 1979, para 47. However, mere administrative provisions are not regarded as sufficient, see ECtHR, *Silver v. UK*, 1983, para. 86.
[114] Limburg principles, principle 50; ECtHR, *Sunday Times v. UK*, 1979, para. 49.
[115] Limburg principles, principle 49. The Limburg principles were convened by experts from the International Commission of Jurists, the Faculty of Law of the University of Limburg and the Urban Morgan Institute for Human Rights,
[116] See *e.g.* Müller 2009, p. 579-583. Such an interpretation would appear to be supported by the Limburg principles, according to which 'the nature of these rights' would prohibit limitations that "jeopardize the essence of the rights concerned", see principle 56.

whereby limitations conflicting with "minimum essential levels" of rights would not be considered justifiable.[117] Another interpretation has been derived from a statement of the Chilean representative during the drafting process of the Covenant, noting that "the problem of restrictions, and limits to their scope, should be closely studied in connexon with each of the rights proclaimed in the Covenant".[118] While reflecting a supplementary means of interpretation,[119] the statement has been argued to indicate that 'the nature of these rights' would prohibit sweeping limitations in relation to all or many ESC rights simultaneously.[120]

The third safeguard laid down by article 4 is the requirement that all limitations be made with the sole aim of "promoting general welfare in a democratic society".[121] This distinguishes the ICESCR from other human rights treaties, generally allowing limitations to be justified in relation to a number of legitimate aims.[122] The *travaux preparatoires* of article 4 ICESCR reveal that such considerations were regarded as inappropriate for the justification of limitations to socioeconomic rights as compared to civil and political rights.[123] It should be noted, however, that article 8 on the right to strike and to form and join trade unions includes a more permissible limitations clause of its own.[124]

Importantly, a number of indications suggest that article 4 should be interpreted in relatively restrictive terms. Indeed, it is noted by the Limburg principles that article 4 was "primarily intended to be protective of the rights of individuals rather than permissive of the imposition of limitations by the State".[125] Examining the drafting

117 The minimum core was first referred to by the Committee in General Comment No. 3, para 10.
118 Mr. Santa Cruz, Chile, Summary Record of the 235th meeting of the UN Commission on Human Rights, 2 July 1951, Un Doc E/CN.4/SR.235.
119 VCLT, 1969, article 32.
120 Alston & Quinn 1987, p. 201.
121 See further, chapter 5.1.
122 The ESC, for instance, allows limitations by reference to "public interest, national security, public health and morals", ESC, article 31(1), revised ESC, article G.
123 Summary record of the 234th meeting of the UN Commission on Human Rights, 2 July 1951. E/CN.4/SR.234, see statements by the Lebanese and Indian representatives, at 20, 23.
124 Article 8(1)(a) and (c) of the ICESCR resembles limitations clauses provided by other human rights treaties by permitting limitations "in the interest of national security or public order or for the protection of the rights and freedoms of others". This might be a consequence of the fact that the rights recognized therein to a larger degree resemble civil and political rights compared to the other Covenant rights.
125 Limburg principles, 1987, principle 46.

history of article 4, such a reference may well reflect the fact that the limitations clause was included with the narrowest possible majority.[126] In its rare references to the limitations clause, the Committee has itself cited the above wording of the Limburg principles, seemingly reiterating a restrictive interpretation of the limitations clause.[127]

The restrictive interpretation of article 4 is moreover supported by; first, the explicit rejection of any other legitimate aims (e.g., public order, public morality, the respect for rights and freedoms of others, or national security, which was never even deliberated upon in relation to article 4), and second, the explicit inclusion of such aims in relation to article 8(1) ICESCR. As explained by Alston and Quinn, however, there may be circumstances, albeit limited, under which justifications other than 'general welfare' may be legitimately invoked. This, provided that a state is able to prove that its aim, such as the rights and freedoms of others or national security, is genuinely identical with that of 'general welfare'.[128]

Before turning to how such complaints should be approached by the Committee under the Optional Protocol, it is necessary to have a better understanding of the content and scope of the concept of non-retrogression. In the following chapter, therefore, I will examine the challenges linked to its interpretation and application by the Committee, the criteria through which state compliance is measured, and the viewpoint in light of which compliance should be scrutinized.

126 The vote on whether to include a general limitations clause was decided favourably by only nine votes to eight, with one abstention. See summary record of the 308th meeting of the UN Commission on Human Rights, 6 June 1952, E/CN.4/SR.308, at 8.
127 CESCR, General comment No. 13: The Right to Education, 8 December 1999, E/C.12/1999/10, para 42; general comment 14: The Right to the Highest Attainable Standard of Health, 11 August 2000, E/C.12/2000/4, para. 46.
128 Alston & Quinn 1987, p. 173.

3. The evolving content of the concept of non-retrogression

3.1. Challenges to the interpretation and application of the concept of non-retrogression

Despite the central role of the concept of non-retrogression, the Committee appears to have had challenges in applying it in a consistent manner. Moreover, it rarely applies the label of 'retrogressive measures' to measures it seems to be addressing as such.[129] Of this follows, that the concept of non-retrogression suffers from an ambiguous normative content to guide its interpretation and application in a given context. The underlying factors behind the Committee's cautious approach towards non-retrogression are thus worth examination.

The first factor relates to the two elements of retrogressive measures: normative and empirical.[130] Whereas the adjudication of normative, *de jure* retrogression merely concerns the assessment of whether a particular legislation has reduced or increased the legal protection of socioeconomic rights, the adjudication of empirical retrogression requires more complex assessments of the factual impact by the action/inaction on the enjoyment of rights. Indeed, determining *de facto* retrogression would require the Committee to inquire into the reasonableness of diverse measures, the assessment of which generally requires long-term monitoring through the collection and analysis of sophisticated sets of data. Such challenges are aggravated by the failure of states to conduct human rights impacts assessments *ex ante*, to be able to assess the foreseeable impacts of their proposed policy changes.[131] Moreover, the plurality of involved actors such as private entities, national governments and intergovernmental bodies, can make it difficult to determine and distribute responsibility.[132]

Another key factor is the requirement of a broad economic knowledge. Assessing *de facto* retrogression will necessarily implicate questions relating to the generation and allocation

[129] See *e.g.,* CESCR, Concluding Observations on the initial report of South Africa, 19 November 2018, E/C.12/ZAF/CO/1, paras. 19-20.
[130] Nolan et al, 2014, pp. 127-128.
[131] European Union Agency for Fundamental Rights (FRA), Protecting Fundamental Rights During the Economic Crisis, 2010. See further, Guiding principles on human rights impact assessment of economic reforms, Un Doc. A/HRC/40/57, 2019, principle 19.
[132] FRA, Protecting Fundamental Rights During the Economic Crisis, 2010*,* pp. 129-130.

of resources, the answers to which vary according to competing schools of economic thought.[133] For example, whereas the neo-classical school would generally advocate for flexibility in terms of labour protection in order to be competitive and thereby promote economic growth, in contrast, the Keynesian view of thought would generally consider such measures ineffective, since unemployment is believed to be a consequence of a lack in demand, resolvable only through the protection of decent wages.[134] Courts thus tend to avoid entering into debates over the choice of economic policy, often perceived as generally irresolvable and lacking empirical certainty.[135] Due to the Committee's lack of economic expertise and sufficient resources for statistical monitoring it has generally focused on the normative aspects of non-retrogression.[136]

The above conforms with the general premise of the U.N. human rights system, based on the separation of law and politics. Questions of political nature are thus generally understood to be outside the scope of human rights bodies' mandate.[137] This understanding is shared by the Committee, according to which it "neither requires nor precludes any particular form of government or economic system being used, provided only that it is democratic and that all human rights are thereby respected".[138] The committee thus insists on its neutrality whether "socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy".[139] State compliance should therefore not be measured solely based on the amount of public expenditure devoted to the realization of socioeconomic rights, since this would clearly contradict the political and economic neutrality of the Covenant.[140] Wills and Warwick nevertheless argue that the Committee, acting as though neutral in relation to the austerity measures adopted during the 2007-2008 economic and financial crisis, in fact pursued a variant of the neo-liberalism. They insist that: "failing to take a stance in relation to a dominant political trend can be to politically acquiesce to that trend". [141]

133 Desierto, 2015, pp. 304-305.
134 Uprimny & Guarnizo, 2008, p. 12.
135 *Ibid.*
136 Nolan et al, 2014, p. 129.
137 Wills & Warwick, 2016, p. 23.
138 CESCR, General Comment No. 3, para 8.
139 *Ibid.*
140 Dowell-Jones, 2004, p. 49.
141 Wills & Warwick, 2016, p. 24.

While expressing a valid point, the alternative might not be problem-free either: a too rigid interpretation of the concept of non-retrogression will namely risk causing unintended human rights impacts.[142] Indeed, as will be examined in more detail in chapter 4, applying an overly strict set of criteria when assessing the compatibility of retrogressive measures might hamper the ability of states to adjust their policies, even for the benefit of less advantaged groups of society. If equated with a prohibition, the concept of non-retrogression would thus impede redistributive efforts by states, aiming to achieve progressive realization in relation to the population as a whole.[143] Concluding that the Committee, by applying a "neutral" approach to retrogression, would automatically be ascribing to a particular school of economic thought, might thus be hasty.

Finally, the reluctance by the Committee to address whether particular state conduct amounts to non-retrogression is argued to be "both a cause and a consequence of the fact that we are in the early stages in the evolution of the *normative content* of non-retrogression".[144] Accordingly, the unclear normative content of the concept has rendered it difficult for the Committee to identify when a particular measure constitutes a retrogression, and even harder to assess whether it may be justified.[145] The aim of the following chapter is thus to delineate the criteria applied by the Committee in assessing compliance with the concept of non-retrogression.

3.2. The Committee's evolving approach towards non-retrogression

As noted above, the concept of non-retrogression does not constitute an absolute prohibition against the adoption of retrogressive measures. The Committee has nevertheless struggled to provide for a balanced set of criteria to determine the circumstances under which such measures may be considered justified. Moreover, the criteria against which retrogressive measures are to be assessed have been subject to frequent change. Of this follows, that the application of the concept of non-retrogression might risk being unforeseeable. While the Committee's approach to non-retrogression

142 Sepúlveda 2003, p. 428, Nohlan et al, 2014, pp. 130-131.
143 See chapter 4.2.
144 Nolan et. al, 2014, p. 132.
145 Sepúlveda, 2003, p. 332.

will vary depending on the supervisory process it is operating through – *i.e.* through the periodic state reporting process or the individual complaints procedure – its concluding observations, general comments and statements may guide its interpretation under the Optional Protocol.[146] It is thus worth examining how the Committee has sought to develop its interpretation of the concept of non-retrogression in light of the above instruments.

Some initial guidance is provided by the 1991 General Comment No. 3, which, as noted, is the Committee's first reference to non-retrogression. In it, the Committee states that any deliberately retrogressive measures must be justified "against the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".[147] The first question is thus how the notion of 'the totality of the rights' should be understood? As a minimum standard, Nolan *et al.* have suggested that it would oblige states to demonstrate that a retrogressive measure adopted would be beneficial to at least some group of society.[148] Similarly, as set forth by the Maastricht Guidelines – adopted in 1998 by a group of more than thirty experts with the objective of elaborating upon the Limburg principles – retrogressive measures might be justified if "done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups".[149] Read together, retrogression might thus be justified against the totality of the Covenant rights, if resorted to in order to achieve decreased inequality by providing for greater coverage of socioeconomic rights protection for disadvantaged groups of society.

The other question relates to the notion of 'the full use of the maximum available resources'. This second phrase has been argued to indicate that retrogression would only be justifiable when resorted to as a consequence of decreased resources, caused by factors beyond the control of the state.[150] Alternatively, it could be interpreted to indicate that a state would only be allowed to adopt retrogressive measures after having demonstrated that it has taken reasonable measures not only to administer existing resources, but also to generate new ones, in order to offset potential decreases in public revenue. Moreover,

146 This is indicated by the Committe in its 2007 statement, para. 2.
147 CESCR, General Comment No. 3, para. 9.
148 Nolan et al 2014, p. 134.
149 Maastricht Guidelines, 1998, para. 14 (d).
150 Nolan et al 2014, p. 134.

as noted by the Committee in *Djazia and Bellini,* the State Party would be required to explain *why* it was necessary to adopt the retrogressive measure at hand.[151] Simply by referring to resource scarcity, or any other justification, is therefore insufficient without a clarification as to the underlying reasons explaining why the measure was necessary for the protection of the totality of the Covenant rights.

Subsequent practice of the Committee points towards a more substantial approach to non-retrogression. Arguably, such practice was influenced by the adoption of the Maastricht guidelines, proclaiming retrogressive measures in violation of the ICESCR.[152] One year later, the Committee included the adoption of retrogressive measures as an issue to be regarded under the section of 'violations' in its own guidelines for the drafting of general comments.[153] A more robust approach to non-retrogression was similarly evidenced by its consecutive general comments: in general comment No. 13, the Committee insisted on a "*strong presumption* of impermissibility of any retrogressive measures".[154] Moreover, states would have the burden of proving that such measures were introduced only after "the most careful consideration of *all alternatives*".[155]

The Committee has expressly prohibited the adoption of retrogressive measures in two contexts: in relation to retrogression that is incompatible with the core content of rights,[156] and in relation to retrogression that is discriminatory.[157] Since the prohibition of discrimination is an obligation of immediate nature, it would seem to indicate that the adoption of retrogressive measures are impermissible in relation to rights that are subject

151 CESCR, *Mohamed Ben Djazia and Naouel Bellini v. Spain* (hereinafter Djazia and Bellini v. Spain), Communication No. 5/2015, 20 June 2017, UN Doc. E/C./12/61/D/5/2015, at para. 17.6.
152 Maastricht Guidelines, 1998, para. 14(e),
153 CESCR, Outline for Drafting General Comments on Specific Rights of the International Covenant on Economic, Social and Cultural rights, 1999.
154 CESCR, General Comment No. 13, para. 45; CESCR, General Comment No. 14, para. 32; CESCR, General comment No. 15, para. 19; CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic production Which He or She is the Author, 12 January 2006, E/C.12/GC/17, para. 27; CESCR, General Comment No. 18: The Right to Work, 6 February 2006, E/C.12/GC/18, para. 21; CESCR, General Comment No. 19, para. 42; CESCR, General Comment No. 21, Right of everyone to take part in cultural rights, 21 December 2009, E/C.12/GC/21, para. 65.
155 See general comments in previous footnote, except for General Comment No. 21.
156 CESCR, General Comment No. 14, para. 48; CESCR, General Comment No. 15, para 42; CESCR, General Comment No. 17, para. 27. See further, chapter 3.3.4.
157 CESCR, General Comment No. 18, para. 34.

to immediate obligations.[158] Finally, in general comment 19, the Committee provided for its most fully-fledged description of the criteria against which non-retrogression would be assessed. While some had been provided for either directly or indirectly in previous general comments, it would also consider whether: the justification was reasonable; alternatives were comprehensively examined; there had been genuine participation of affected groups in examining the proposed measures and alternatives; the measures have a sustained impact on the realization on the right, and finally; whether there had been an independent review of the measures at the national level.[159]

Another important instrument for the assessment of non-retrogression is the 2007 statement 'An Evaluation of the Obligation to Take Steps to the "Maximum Available Resources" under an Optional Protocol to the Covenant'. In it, the Committee provided for a set of "objective criteria" that it would consider when evaluating the explanation of a State Party for having adopted retrogressive measures.[160] In contrast to the general limitations clause, under which limitations are allowed solely for the 'promotion of general welfare', the statement revealed that retrogressive measures could be justified under article 2(1) as a consequence of resource constraints.[161] However, not just any justification of retrogression based on resource constraints would be considered sufficient; such information would be considered on a country-by-country basis, in light of the following criteria:

> (a) the country's level of development;
> (b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
> (c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession;

158 This is moreover indicated by the CESCR in General Comment No. 23 on the right to just and favourable conditions of work, 7 April 2016, E/C.12/GC/23, para. 52.
159 CESCR, General Comment No. 19, para. 42.
160 CESCR, An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant (hereinafter 2007 statement), 21 September 2007, E/C.12/2007/1, para. 10.
161 The drafting history of the ICESCR suggest that the compatibility of adjustments in the level of access to rights due to resource constraints were not intended to be assessed under article 4, but rather under article 2 (1). See further chapter 5.1.

(d) the existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.
(e) whether the State party had sought to identify low-cost options;
(f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.[162]

Accordingly, the statement provides for examples when retrogressive measures may be justified, namely during periods of economic recession (c) as well as natural disasters and armed conflicts (d). While the criteria are helpful in understanding how the Committee will evaluate retrogression, they are formulated in relatively general terms (arguably so as to apply in a global context), thus risking weakening their guiding effect. [163] It might for instance be questioned what kind of situation entailing 'serious' claims on the State party's limited resources will be considered serious enough. Moreover, as described above, it has been argued that the adoption of retrogressive measures would only be justifiable as a consequence of decreased resources due to factors beyond the state's control. Considering the multiplicity of responsible actors for the outbreak and continuation of both international and national armed conflicts, it is unlikely that the Committee would accept retrogression solely based on the existence of an armed conflict.[164] The same would apply for other serious claims on the resources of a state, particularly economic crises.

Accordingly, from a rather modest start in 1991, through subsequent general comments, concluding observations and statements, the Committee's has advanced a relatively comprehensive set of criteria on how it will apply the concept of non-retrogression in the context of periodic state reporting processes. In turn, these criteria might guide the Committee when adjudicating retrogression-related complaints under the Optional Protocol. It is noteworthy, however, that the Committee's approach to the concept of non-retrogression has not been fully consistent over the course of the last two decades. Indeed, in a 2012 letter concerning "the protection of the Covenant rights in the context of the

[162] CESCR, 2007 statement, para. 10.
[163] O'Cinneide, 2014, p. 195.
[164] Müller, 2009, p. 587.

economic and financial crisis", [165] the Committee appears to have adopted a relatively lenient approach compared to previous instruments as delineated above. [166]

The way in which the letter assumes a more flexible approach towards retrogression is twofold. First is the language used in the letter; it is for instance unequivocally accepted that a lack of growth impedes progressive realization, and that some adjustments in the implementation of rights are "inevitable". Moreover, states are prescribed to merely avoid the denial of socioeconomic rights rather than refrain from doing so.[167] Second, the letter appears to have changed the circumstances under which adjustments may be taken (these circumstances are examined more closely below). Particularly, the letter does not refer to language used in earlier general comments, according to which retrogressive measures would need to be justified "against the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources", or when introduced after "the most careful consideration of all alternatives". Neither does it refer to a "strong presumption of impermissibility of any retrogressive measures" or to the several new criteria introduced by general comment 19, as delineated above.[168] Notably, in its post-2012 general comments, the Committee has refrained from referring to the above jurisprudence on the concept of non-retrogression, instead applying the criteria laid down by the 2012 letter.[169]

Notwithstanding that both the 2012 letter and the 2007 statement lack legally binding force in terms of the traditional legal sources as set forth by article 38 of the ICJ statute, they are nevertheless widely applied by the Committee. As such, they might shape the practice of State Parties reacting to them and might thereby contribute to the formation of customary international law (while not reflecting state practice in themselves).[170] The

165 Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights (hereinafter, letter dated 16 May 2012)
166 According to Warwick, the Committee has moved from an "business as usual" approach to an "accommodations" approach: see, Warwick 2016, pp. 255-259.
167 Warwick 2016, p. 256.
168 In contrast, the letter seems to be in line with the Committee's 2007 statement, by accepting the possibility to justify retrogressive measures as a consequence of serious claims on the State party's limited resources.
169 See CESCE, General Comment No. 22, para 38; CESCR, General Comment No. 23, para. 52.
170 See *e.g.* Wood, 2016, p. 8.

Committee has moreover referred to the 2012 letter in the communication *Djazia and Bellini v. Spain,* the only complaint so far where it has considered the doctrine on non-retrogression.[171] This would appear to suggest that the Committee is, indeed, guided by the 2012 letter when assessing individual complaints under the Optional Protocol. Importantly, however, neither in the letter nor in the above communication has the Committee expressly stated how the "adjustments" it refers to should be understood. Indeed, not once does it mention the term 'retrogressive measures'. The question is thus whether the adjustments referred to should be understood as retrogressive measures in terms of article 2(1) or as limitations in terms article 4?[172] Subsequent practice by the Committee would imply the former; in its 2017 concluding observation to Sri Lanka, for instance, it expressly stated that retrogressive measures may be justified, provided they meet the criteria of the 2012 letter.[173] The repeated failure by the Committee to spell out the nature of the measures it is referring to, would nevertheless suggest that there is room for interpretation when considering the relationship between retrogressive measures and limitations.

Considering the apparent importance of the 2012 letter, as examined above, the four criteria laid down it – temporariness, necessity and proportionality, non-discrimination, and the protection of the minimum core – will be examined in the following chapter.

3.3. Assessing non-retrogression in light of the 2012 letter

3.3.1. The criterion of temporariness

According to the first criterion of the 2012 letter, any "proposed policy change or adjustment" must be 'temporary'. In accordance with the ordinary meaning of the word, retrogressive measures should thus last for a "limited period of time".[174] The Committee has moreover stated that such measures should only cover the "period of the crisis".[175]

171 CESCR, *Djazia and Bellini v Spain*, para. 17.6.
172 See further, chapter 5.1.
173 CESCR, concluding observations on the fifth periodic report of Sri Lanka, 4 August 2017, E/C.12/LKA/CO/5, para 22, stating that "Any retrogression measures are acceptable under exceptional circumstances of economic hardship, providing, however, that they are temporary, non-discriminatory, proportional and do not affect disadvantaged and marginalized persons and groups".
174 Oxford English Dictionary, temporary: https://en.oxforddictionaries.com/definition/temporary (last accessed 8.10.2019).
175 Letter dated 16 May 2012.

However, since it is difficult to strictly define the beginning, and even less the end of a crisis, the notion does little to provide guidance on the actual period of time retrogressive measures might be considered justifiable. Nevertheless, given the Committees acceptance of retrogressive measures in times of resource scarcity, one could argue that the duration of a retrogressive measure could be considered acceptable, as long as it ceases by the time resources continue to increase. As many particularly war-torn states suffer from a lack of available resources for years – or even decades – such an understanding does not, however, seem to be in line with the understanding that retrogressive measures should last only for a 'limited period of time'.

Although the exact definition of the requirement of temporariness may be questioned, it has nevertheless been applied by the Committee in a wide range of concluding observations, particularly in relation to post-crisis austerity related policy adjustments. For instance, in its 2018 concluding observation on Spain, the Committee expressly criticized the regressive effects of a law limiting the quality of and access to health-care services by irregular migrants, *inter alia*, since it was not considered temporary.[176] Similarly, in relation to South Africa, the Committee expressed its concern over the fact that the State Party had introduced austerity measures without defining when such measures would be re-examined or lifted.[177] Temporariness has similarly been considered by a number of domestic courts, for instance the Constitutional Courts of Latvia and Portugal.[178] According to the latter, retrogressive measures have been held to meet the requirement of temporariness, when imposed for a specific duration at a time.[179]

The question of duration is made more complex by the possibility to differentiate between the temporariness of an actual measure on the one hand, and the temporariness of its impacts on the other. Concerning the latter, it is beyond doubt that the austerity measures

176 CESCR, Concluding observations on the sixth periodic report of Spain, 25 April 2018, E/C.12/ESP/CO/6, paras. 41,42.
177 CESCR, Concluding Observations on the initial report of South Africa, 19 November 2018, E/C.12/ZAF/CO/1, para. 18.
178 See e.g., Constitutional Court of Latvia, 21 December 2009, Case No. 2009–43–01, para. 32, Constitutional Court of Portugal, 5 April 2013, Judgement No 187/2013 (Portugese Budget Law Case), See further Kirvesniemi, 2015, pp. 23-27.
179 In the Portugese Budget Law Case the duration at hand was one year. See English summary, chapter 3: http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html (last accessed 8.10.2019).

of the 2007-2008 economic and financial crisis have resulted in long-term adverse human rights impacts in a number of European countries, for instance by way of a sustained youth unemployment, potentially impacting the future economic opportunities of young people for a significant amount of time.[180] As it would seem extremely difficult to measure the *de facto* temporariness of the human rights impacts of retrogressive measures, it may be presumed that the Committee, by stating that the policy must be a temporary measure, is referring to the actual measures taken instead of their impacts. Nevertheless, considering that even short-term decisions may have significantly detrimental, even fatal, effects on people – for instance in relation to people suffering from HIV/AIDS when support for essential medicines is reduced – it has been argued the notion of temporariness should be understood by both nature and effect.[181]

The question of whether a retrogressive measure will remain temporary or become entrenched may furthermore be influenced by whether the measure in question is based on legislative or structural reforms, compared to policy or budgetary amendments of a more temporary nature. For instance, after the economic and financial crisis some governments chose to enact permanent ceilings on their public deficit. While aiming to reduce borrowing costs, such decisions limited the possibility of future governments to institute economic revival measures, necessary to mitigate the adverse human rights impacts of economic recessions.[182]

Since the Committee has not purported to define the content and scope of temporariness, it may be helpful to look at the jurisprudence of other human rights bodies. Indeed, guidance may be drawn from jurisprudence of the Human Rights Committee (HRC) as well as the European Court of Human Rights (ECtHR), which have considered the notion of temporariness in relation to derogations. In particular, while neither the European Convention on Human Rights (ECHR),[183] nor the ICCPR expressly require derogations to be temporary, the HRC has asserted in General Comment No. 29 that measures

[180] Lusiani, 2016, p. 225.
[181] Nolan et. al, 2014, p. 140.
[182] Lusiani, 2016, p. 224.
[183] European Convention on Human Rights, formally: Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR), 4 November 1950, ETS No. 005.

derogating from the ICCPR "must be of an exceptional and temporary nature".[184] The ECtHR, however, has held that while the duration of measures derogating from the ECHR may be relevant for assessing the proportionality of such measures in relation to article 15 of the ECHR, they do not have to be of a fixed duration.[185] Rather, the approach of the ECtHR has been understood to imply that the emergency measures must be lifted by the time the 'life of the nation' disappears,[186] or the measures taken are no longer strictly necessary or proportional to address the threat.[187] This would support the view put forward above, according to which the acceptable duration of retrogressive measures should not be measured against the "temporariness" of the measures *per se* but rather in relation to when available resources begin to increase. Alternatively, therefore, instead of looking at the temporariness rule in a vacuum, the Committee could assess the duration of a retrogressive measure as one factor relating to the necessity and proportionality of the measures. These will be examined to the following.

3.3.2. The criterion of necessity and proportionality

Indeed, the second criterion laid down by the 2012 letter requires that any retrogressive measure be necessary and proportionate, "in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights".[188] Proportionality may generally be held to express the view that "the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required".[189] Understood as the final stage of the proportionality analysis, the principle of proportionality will be examined more closely in chapter 4 in relation to the Committee's adjudication of negative obligations. The present chapter will thus focus on the requirement of necessity – the test of whether less intrusive but equally effective means would have been available to the state.[190]

184 Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para. 2.
185 European Court of Human Rights (hereinafter ECtHR), Complaint No. 3455/05, *A & Others v. United Kingdom*, judgement of 19 February 2009, para. 178.
186 ECHR, article 15.
187 Criddle, 2014, p. 205.
188 Letter dated 16 May 2012.
189 See *e.g.* Taggart, 2008, p. 423.
190 See *e.g.* Alexy 2002 pp. 66-69, Kumm, 2007, pp. 131, 138-139.

The necessity of retrogressive measures has been considered by the ECSR in its decision *IKA-ETAM c. Greece*. The case concerned severe austerity measures made by Greece in relation to social security benefits, as part of a bailout agreement made with the International Monetary Fund, the European Central Bank and the European Commission (The Troika).[191] In it, the ECSR accepted that reductions to social benefits could be compatible with article 12(3) ESC, provided they were necessary for the maintenance of the social security scheme in times of economic hardship.[192] While recognizing the economic crisis faced by Greece, it stated that the Greek government had not conducted a necessary level of research into the adverse impacts of its measures, particularly on disadvantaged groups of society.[193] Accordingly, Greece had not made careful consideration of all alternatives.[194] Similarly, the CESCR has noted that retrogressive measures may be introduced only after "the most careful consideration of all alternatives".[195] Moreover, according to the 2007 statement examined earlier, the Committee may assess whether the State Party has adopted the least restrictive alternative.[196] It may thus be concluded that a State Party, in order to comply with the requirement of necessity, and hence to demonstrate that it has considered all alternatives (and potentially chosen the least restrictive one), is under an obligation to conduct an adequate human rights impact assessment prior to introducing retrogressive measures.[197]

Moreover, the criterion of necessity may be understood to require a State Party to demonstrate that it has taken steps "to the maximum of its available resources",[198] in order to progressively realize the Covenant rights.[199] States are thus under an obligation not only to administer existing resources, but also to mobilize new ones.[200] The obligation to mobilize resources is closely linked with the concept of non-retrogression, since states

191 ECSR, *Federation of Employed Pensioners of Greece (IKA-ETAM) v. Greece* (hereinafter IKA-ETAM v. Greece), Complaint No. 76/2012, decision on the merits, 7 December 2012.
192 ESCR, *IKA-ETAM v. Greece*, para 71.
193 *Ibid.*, It thus held that the cumulative effects of the restrictions were bound to bring about a "significant degradation of the standard of living and the living conditions of many of the pensioners concerned", paras. 78-79.
194 *Ibid.,* para. 80.
195 CESCR, General Comment No. 19, para. 42.
196 CESCR, 2007 statement, para. 8 (d).
197 See further, Human Rights Council, Guiding Principles on Impact Assessment of Economic Reforms, UN Doc. A/HRC/40/57, 2018.
198 ICESCR, article 2(1).
199 Lusiani, 2014, p. 220.
200 Balakrishnan & Heinz, 2016, p. 21.

may be inclined to invoke the lack of available resources as justification for retrogression. As described by Balakrishnan and Heinz, there are five main areas that affect the resources potentially available to the state: government expenditure; government revenue; development assistance, debt and deficit financing; and, monetary policies and financial regulation.[201] The above thus obliges states to take positive action, *inter alia* by developing fiscal policies capable of generating sufficient revenue for the realization of human rights.[202]

Human rights-oriented fiscal policies are thus imperative to offset contradictions in public revenue in circumstances under which available resources are limited, for instance during an economic crisis. This may be evidenced by several Concluding Observations such as the 2017 review on Sri Lanka, in which the Committee expressed its concern about the fact that the fiscal revenue of Sri Lanka had diminished as a percentage of the gross domestic product (GDP).[203] It further commented upon the low level of public expenditure in relation to social protection programs, as well as the significant budgetary cuts made in relation to education and health care. The Committee thus expressed concern about such conduct amounting to unjustifiable retrogression, since it did not meet all the criteria laid down in the 2012 letter. While the Committee did not expressly state which criterion it referred to, the fact that the above was stated under the title "progressive realization and maximum available resources" points towards the fact that by not incorporating a human rights-centred fiscal strategy, the state party had failed to justify the 'necessity' of its retrogressive measures.[204]

Since the criterion of necessity and proportionality raise questions of resource allocation, competing schools of thought will in turn be invoked, as discussed earlier. Reiterating the fact that the Covenant does not dictate any particular form of government or economic system, states are left with a margin of discretion to decide upon which measures they

[201] *Ibid.*, 2016, p. 60.
[202] Balakrishnan & Heinz, 2016, p. 60. However, despite their legal obligations under the ICESCR and the ESCR, many European states, for instance, have shown reluctance to redistributing income through high taxation, or in other ways to intervene in the functioning of the free market. See Further O'Cinne 2014, p. 182.
[203] CESCR, concluding observations on the fifth periodic report of Sri Lanka, 2017, paras. 22-11.
[204] See generally on the maximum available resources clause Uprimny, Chaparro, Araújo, 2019.

deem appropriate.[205] Needless to say, evaluating whether maximum available resources have been used in order to necessitate retrogressive measures, is not an easy task for the Committee. Importantly, however, it has noted that "the ultimate determination as to whether all appropriate measures have been taken remains one for the Committee to make".[206] In determining the 'appropriateness' of whatever measures adopted by the state, the Committee will assess their effectiveness in realizing the Covenant rights.[207] Thus, in addition to assessing whether adequate resources have been generated and allocated for the realization of ESC rights, the Committee may also look at whether such resources have been effectively and efficiently spent.[208] Such considerations are influenced by various factors, such as whether steps have been taken against tax evasion and corruption,[209] and whether resources devoted to the realization of ESC rights have actually been used for said purpose and not diverted for other purposes.[210]

3.3.3. The criterion of non-discrimination

The third criterion laid down by the 2012 letter prohibits retrogressive measures that are deemed either directly or indirectly discriminatory. State Parties are obliged under article 2(2) of the Covenant to ensure that Covenant rights are exercised without discrimination of any kind based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. The latter ground confirms that the list of prohibited grounds is not exhaustive, thus allowing for the inclusion of other comparable grounds. The Committee has defined discrimination as follows:

> …any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights.[211]

[205] Engström, 2016, p. 7.
[206] CESCR, General Comment No. 3, para 4.
[207] CESCR, General Comment No. 9: The domestic application of the Covenant, 3 December 1998, E/C.12/1998/24, para. 4
[208] O'Connell et. al., 2014, p. 56.
[209] Human Rights Council, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, on taxation and human rights, 22 May 2014, Un doc. A/HRC/26/28. See further, Balakrishnan & Heinz, 2016, p. 62.
[210] O'Connell et. al., pp. 56, 75.
[211] CESCR, General Comment No. 20: Non-discrimination in economic, social and cultural rights, 2 July 2009, E/C.12/GC/20, para. 7.

The above implies that states should not only ensure the removal of discrimination from their constitutions, legislation and other policy documents, but also to actively address substantive discrimination.[212] Greater resources should thus be directed to groups that have traditionally faced marginalization and are thus subject to systemic discrimination.[213] Indeed, the Chairperson of the Committee emphasized in the 2012 letter that all state policies must be non-discriminatory and support the mitigation of inequalities, prone to grow during times crisis. Particular attention should moreover be accorded to disadvantaged and marginalized individuals and groups in order to ensure that they are not disproportionately affected. [214] The same has been reiterated by the Committee in a number of subsequent concluding observations.[215] States should moreover ensure that any retrogressive measures taken in relation to the provision of certain public services do not have disproportionate impacts on women. Limiting the provision of key infrastructure such as energy, water and sanitation facilities, for instance, are deemed to have severe impacts on women and girls, often responsible for household chores and caring of infants and elderly.[216]

In contrast, it may be argued that retrogressive measures are justifiable when aiming to ensure the rights of disadvantaged groups. Indeed, the Committee has indicated that retrogression might be justified in order to direct resources towards the implementation of a general policy or emergency plan when seeking to progressively realize rights "especially for persons in a particularly vulnerable situation".[217] The criteria of necessity and non-discrimination are thus closely intertwined.

[212] De Shutter, 2019, pp. 546-547.
[213] CESCR, General Comment No. 20, paras. 8, 39.
[214] Letter to States Parties dated 16 May 2012.
[215] See *e.g.* CESCR, concluding observations on the fourth periodic report of Portugal, 8 December 2014, E/C.12/PRT/CO/4, para. 6; CESCR, concluding observations on the combined second to fourth periodic reports of Egypt, 13 December 2013, E/C.12/EGY/CO/2–4, para. 6.
[216] Human Rights Council, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, 9 August 2013, A/68/293, para. 15.
[217] CESCR, *Djazia and Bellini v. Spain*, para. 17.5.

3.3.4. The criterion of identifying and protecting the minimum core content of rights

According to the final criterion of the letter, a proposed policy change must "identify the minimum core content of rights…and ensure the protection of this core content at all times."[218] According to the concept of the minimum core content of rights, states are obliged to ensure minimum essential levels of each of the rights set forth by the Covenant. The concept was expressed already by the 1987 Limburg Principles, according to which "[s]tates parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all".[219] The same idea has been expressed by the Committee on several occasions, albeit in shifting forms. Indeed, the Committee has variously presented the minimum core as either a prioritization-related principle or as a non-derogable legal obligation.[220] The content of the minimum core – and how it should be interpreted to guide states in issuing retrogressive measures – thus remains murky.

While the Committee referred to the minimum core already in General Comment No. 3, it did not, however, include any reference to it in the Optional Protocol. Rather, it opted for the so-called reasonableness review, discussed more in detail in following chapters. The question is therefore, how, or whether, the minimum core marries with the reasonableness review. In accordance with later expressions of the Committee,[221] as well as commentators,[222] it may be assumed that the minimum core should generally not be interpreted in absolute terms: even states failing to ensure minimum levels of enjoyment may attribute such failure to the lack of resources by demonstrating that "every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[223] Accordingly, should a state be able to convincingly explain its inability to attain a minimum level of a right, even after having consulted international assistance,[224] it may be presumed to have complied with its obligations under the Covenant.

218 Letter to States Parties dated 16 May 2012.
219 Limburg principles, principle 25.
220 Compare particularly General Comment No. 3, para. 10 and General Comment No. 19, para. 60 (equated with a principle of prioritization) with General Comment No. 14, para 47 (expressed in absolute terms). See generally, Young, 2008.
221 General Comment No. 19, para. 60.
222 See *e.g.* De Shutter, 2019, pp. 529, 554-557.
223 General Comment No. 19, para 60.
224 ICESCR, art. 2(1).

Careful not to pronounce itself in absolute terms, the same approach would appear to have been adopted by the Committee in its recent jurisprudence. Indeed, in its to date sole case on non-retrogression, *Djazia and Bellini v. Spain*, the Committee noted that non-fulfilment would be possible to justify provided that all necessary steps would have been taken, to the maximum of their available resources.[225] In it, the Committee had to determine whether the eviction of the authors and their two minor children from their private rental accommodation, in light of the authorities' failure to grant alternative housing and thus rendering the authors homeless, amounted to a violation of their right to adequate housing. Such a failure was considered to be a *prima facie* violation of the right at hand, particularly due to the lack of legislation allowing judges to consider the compatibility of an eviction with the Covenant or to suspend an eviction order before alternative accommodation was found.[226] Spain had moreover resorted to retrogression by selling part of its public housing stock to private investment companies, thus reducing the availability of housing in the middle of a severe housing crisis.[227]

The burden was thereby shifted to the state to prove that it had been unable to uphold the right to adequate housing despite having taken all necessary measures to the maximum of its available resources.[228] Due to the inability of Spain to explain *why* the denial of the authors' social housing was necessary – for instance due to a need of redirecting its resources towards the progressive realization of the right to housing of particularly marginalized persons – the Committee did not find its measures justified.[229] Importantly, by stating that the denial of alternative housing would not have been prohibited, had it been compelled to do so in order to progressively realize the rights of particularly vulnerable individuals, the Committee thus effectively rejected any absolutist form of the minimum core. It should moreover be noted that the Committee, in referring to the 2012-letter, stated the following: "in times of severe economic and financial crisis, all budgetary changes or adjustments affecting policies must be temporary, necessary,

225 CESCR, *Djazia and Bellini v. Spain*, para. 17.5.
226 CESCR, *Djazia and Bellini v. Spain,* paras. 16.4-5.
227 *Ibid.,* para. 17.5-6.
228 *Ibid.,* para. 17.8.
229 *Ibid.,* para. 17.5.

proportional and non-discriminatory".[230] Notably therefore, the Committee referred to all criteria, except the requirement to identify and protect the minimum core content of rights.

It may thus be concluded that the concept of the minimum core is better viewed as a tool for priority-setting, in which the needs of marginalized individuals and groups should be prioritized, rather than an absolute bar against retrogressive measures.[231] Moreover, due to the failure by the Committee to define the actual meaning of the criteria as delineated above, and hence the difficulties in determining their normative content and scope, a better view would be to review them as factors informing the overall assessment of the reasonableness of the steps taken. Before turning to the question of the judicial enforcement of the Covenant rights, it is first worth to examine the viewpoint in light of which retrogressive measures should be assessed.

3.4. Assessing retrogression in relation to a particular claimant or in relation to the population as a whole

As noted by Liebenberg, one of the greatest difficulties with assessing non-retrogression is whether compatibility should be examined in relation to a particular claimant or groups of claimants, or in relation to the population as a whole.[232] If the former interpretation is applied, it would mean that the state is under an obligation to justify any retrogression taken in relation to a particular individual or group of individuals, regardless of whether the state can demonstrate an increase in the overall enjoyment of the rights under assessment in respect of the entire population. In contrast, if the latter interpretation is applied, the state would not be obliged to justify a reduction provided it would be able to demonstrate an overall improvement in access to the rights assessed in relation to the population as a whole. In other words, the state would not need to justify retrogressive measures taken in relation to any particular individual or group of individuals, provided that the overall access to benefits would not have decreased.[233]

230 *Ibid.,* para. 17.6.
231 See generally *e.g.* Forman, 2016.
232 Liebenberg, 2010, p. 189.
233 *Ibid.*

The latter interpretation was adopted by the Inter-American Court of Human Rights (IACHR) in its judgement in the case of *Five Pensioners v. Peru,* in which the Court had to consider whether the state of Peru had violated the right to social security of the five litigants by reducing their pensions.[234] Ruling in favour of the pensioners, the Court found a violation of the right to property and to judicial protection under articles 21 and 25 of the American Convention on Human Rights. The Court nevertheless declined to rule on the right to progressive development of economic, social and cultural rights under article 26 of the Convention. According to the Court:

> Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.[235]

In terms of rejecting the request to rule on article 26, the IACHR thus adopted the collective interpretation of non-retrogression by not requiring Peru to justify the reductions made in relation to the particular five pensioners. As noted above, such a requirement (if examining non-retrogression in terms of the population as a whole) is conditioned by evidence that the overall access to pensions would have reduced. According to the IACHR it was "evident" that the pensioners did not "represent the prevailing situation…in the instant case".[236] The court thus effectively precluded individuals from raising complaints against alleged violations of their socioeconomic rights under article 26, unless able to prove harm not only to themselves, but at least to some extent to the population as whole. As noted by Melish, the court thus seemed to "subordinate the individual as a rights *titulaire*, entirely to the sum of the population".[237] Although the five litigants belonged to advantaged groups of society and had disproportionately high pensions (amounting to 3500 US dollars in comparison to the

234 Inter-American Court of Human Rights (IACHR), *Case of the "five pensioners" v. Peru* (hereinafter Five pensioners v. Peru), judgment of 28 February 2003. No. 98.
235 IACHR, *Five pensioners v. Peru*, para 147.
236 IACHR, *Five pensioners v. Peru*, paras. 147-148.
237 Melish, 2005, p. 57.

average Peruvian monthly income of 175 US dollars) – and while this should without doubt have been considered at the merits stage – it should not have affected their standing. Indeed, all human rights – whether civil, cultural, economic, political or social – belong equally to everyone, regardless of socioeconomic status.

Focusing entirely on the sum of the population over the individual rights-holder, would thus seem to obscure the entire purpose of human rights; the well-being and dignity of all individuals.[238] Of this follows, that assessing the compatibility of retrogressive measures would arguably have to be made in relation to an individual or groups of individuals, rather than in relation to the population in its entirety. This appears to be supported by the observation of the SACC in *Grootboom*, noting that a statistical advance in the realization of socioeconomic right will not be considered sufficient in meeting the test of reasonableness, if the state fails to treat everyone with care and concern.[239]

As will be demonstrated below, however, one of the main concerns with the enforcement of non-retrogression in relation to individual litigants are the distributive effects linked therein; by way of strengthening the access to benefits by the more advantaged, courts simultaneously risk obstructing governments' broader aims of achieving a more equitable distribution of resources.[240] It is thus worth examining the broader questions of judicial enforcement and issues of distributive justice linked therein.

238 See *e.g.* Universal Declaration of Human Rights (UDHR), articles 1, 25.
239 *Grootboom*, para. 44.
240 See further chapter 5.3.

4. The judicial enforcement of socioeconomic rights

4.1. A typology of court postures

Before addressing how the Committee should adjudicate retrogression-related complaints under the Optional Protocol, it is useful to consider the various approaches, or postures, courts may have in relation to social rights adjudication in general. Such postures are described by Tushnet in his categorization of "strong" and "weak" courts, and the forms of judicial review linked to them.[241] It should be noted that the terms 'judicial review' and 'standard of review' essentially refer to two distinct, albeit interrelated, processes; whereas the former refers to the process through which courts determine whether the actions by the executive or legislature conform with the constitution, the latter refers to the degree of deference allowed by courts when reviewing a decision of a lower court (or the state in the context of an international judicial or quasi-judicial body, such as the Committee). The lessons learned from the theory on strong-form and weak-form judicial review is nevertheless important in the context of the present thesis since, I argue, it provides for valuable insight into how the Committee should purport to apply the reasonableness standard of review when adjudicating retrogression-related complaints under the Optional Protocol.

Whereas strong courts are argued by Tushnet to operate with structured and rule-like standards, strict scrutiny and far-reaching remedies, weak courts are argued to be accompanied by contextualized standards, relaxed scrutiny – and if liability is found – relatively weak remedies.[242] Rather counterintuitively, perhaps, it is argued by Tushnet that social rights are better enforced and protected through weak-form judicial review. This, particularly since muscular pronouncements may risk reinforcing the critique against the justiciability of socioeconomic rights. The pattern may be described as a separation of powers issue: the legislative and executive branches of the state may feel threatened, and thereby wish to replace the sitting judges or otherwise to limit the powers of the court.[243] Accordingly, and as noted by Nonet and Selznik, proactive adjudication may undermine the legitimacy of the court, spark counter-reactions or even backlashes.[244]

241 See generally, Tushnet, 2008.
242 *Ibid.* See further, Young 2010, p. 390.
243 Landau, 2012, p. 235.
244 Nonet & Selznick, 2017, p. 117.

Excessive strength might therefore threaten the very interests that the courts aim to protect. Weaker forms of judicial review, on the other hand, are held to enhance the ability of courts to protect rights, while simultaneously allowing the elected branches to have the greatest decision-making power.[245]

Being mindful of the risks associated with strong-form judicial review (or, in the case of the Committee, rigid standards of review) is particularly important in relation to the adjudication of retrogression-related complaints. This, especially when considering the context in which retrogressive measures are usually adjudicated; in times of economic distress when structural adjustments are often deemed necessary. Needless to say, such legislative decisions may be highly unpopular with the public, whereby courts may feel tempted to strike down attempted government reforms. As stated above, however, an excessively pro-active enforcement of socioeconomic rights by way of applying strict standards may risk being short-lived; this, since the other branches of the state may wish to alter judicial behaviour through the appointment process, if not by more drastic measures, if pushed to its limits.[246]

In the context of the Committee, the application of rigid standards of review (particularly in relation to positive obligations, typically perceived as more encroaching upon the powers of the elected branches) might similarly impact the nomination of candidates by State Parties.[247] More importantly, however, any perceived concerns over the illegitimacy of the Committee might stagnate the ratification of the Optional Protocol. [248] Moreover, concerns of illegitimacy might impact the degree to which State Parties feel compelled to follow the (non-binding) views of the Committee. Hence, from the viewpoint of enforcing socioeconomic rights – particularly in relation to the adjudication of retrogression-related complaints – it would appear to be beneficial to favour less absolutist standards of review.

[245] See *e.g.,* Kavanagh, 2015, p. 2.
[246] Landau, 2012, p. 235, discussing how less-activist judges were appointed in Hungary and Colombia to replace the outgoing, more activist courts.
[247] On the appointment process of the members of the CESCR, see ECOSOC resolution 1985/17 establishing the CESCR, UN Doc. E/RES/1985/17, para. b.
[248] To date, the OP-ICESCR has 24 State Parties (2 Oktober 2019). Compare *e.g.* to the OP-ICCPR, 116 State Parties.

More recent studies tend to focus not only on the weak/strong dichotomy, but also on the impact of the interaction between courts and other state and non-state actors on the enforcement of socio-economic rights.[249] Langford, for instance, argues that a responsive court can avoid the uncertainties linked to its institutional competence by way of being "reflexively mindful of its relationship with other actors".[250] This could be achieved by allowing or requesting *amicus curiae* submissions and developing new, innovative processes for gathering evidence.[251] Beyond concerns linked to the separation of powers doctrine, strong forms of review may risk leading to a middle-class bias. This, because of the relative advantage of higher-income groups in gaining access to judicial processes,[252] and because budgetary decisions by courts may unable the other branches of the state to redirect resources to individuals and groups of individuals in more dire need. The question of distributive justice linked to the enforcement of socioeconomic rights is thus worth further examination.

4.2. The judicial enforcement of socioeconomic rights and distributive justice

With the establishment of an international complaint mechanism for the protection of socioeconomic rights, hopes were raised for a more socially just society. As stated by former justice of the Canadian Supreme Court Louise Arbor "[t]he possibility for people themselves to claim their human rights entitlements through legal processes is essential so that human rights have meaning for those most at the margins".[253] While it is suggested that the main purpose of socioeconomic rights is to raise the economic status of the poorest and most marginalized members of society, empirical literature nevertheless points towards a gap between theory and practice.[254] It has namely been shown that

[249] See *e.g.*Young, 2010. The five-part typology developed by Young is particularly helpful by highlighting the multidimensionality of social rights adjudication. The types are: 1) deferential; 2) conversational; 3) experimental; 4) managerial; and 5) peremptory.
[250] Langford, 2019, p. 74.
[251] *Ibid.*
[252] Sajó, 2006, p. 83.
[253] Louise Arbour, UN Commissioner for Human Rights, Freedom from Want – From Charity to Entitlement', LaFontaine-Baldwin Lecture*,* 2005, available at: https://newsarchive.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=3004&LangID=E (last accessed 8.10.2019)
[254] Landau & Dixon, 2019, pp. 110-111.

socioeconomic rights are often enforced without "focusing exclusively, or even primarily, on the marginalized."[255]

Case study evidence drawn from national contexts may serve to illustrate this point. In Brazil, for instance, courts have typically been reticent towards addressing collective claims, instead focusing on individual actions.[256] This tendency is particularly notable in relation to health right cases concerning the access to medicines and medical treatment.[257] Similar patterns have been argued to exist in other Latin American states, for instance Colombia[258] and Costa Rica.[259] The cautious approach towards collective claims is believed to be motivated by concerns of institutional capacity and legitimacy, by courts not wanting to appear as if trying to influence public policy decision-making.[260] Arguably, this practice risks leading to a twofold asymmetry: first, by granting individual claims standing relatively easier than collective ones, and second, by stressing the absolute character of the right to health when adjudicated in relation to individual claims (as compared to collective claims).[261] Consequently, some scholars claim that the main beneficiaries of the socioeconomic rights enforcement in Brazil belong to the middle class.[262] As Ferraz notes:

> Rather than enhancing the provision of health benefits that are badly needed by the most disadvantaged – such as basic sanitation, reasonable access to primary health care, and vaccination programs – this model diverts essential resources of the health budget to the funding of mostly high cost drugs claimed by individuals who are already privileged in terms of health conditions and services[263]

Other scholars nevertheless argue that the risks of social rights litigation may at times be overstated. In particular, while the enforcement of socioeconomic rights is undoubtedly challenged by distributive bias, there are significant variances across countries and across

255 Landau & Dixon, 2019, p. 111. As noted by the authors, however, this should not be read as to imply that the enforcement of socioeconomic rights would never or rarely benefit marginalized groups.
256 Langford, 2019, p. 120.
257 *Ibid.*
258 On Colombia, see Landau, 2012, pp. 213-214.
259 On Costa Rica, see Norheim & Gloppen, 2011, p 304.
260 Ferraz (a), 2011, p. 72.
261 Hoffman and Bentes, 2008, pp. 141, 144.
262 Ferraz (a), 2011, p. 76.
263 *Ibid.*

time.[264] It is moreover noted that the causal relationship between judicial enforcement orders and the social outcomes they lead to might not always be linear; while they are directed towards higher income groups they may benefit disadvantaged groups indirectly.[265] Langford also points to the fact that determining whether social rights adjudication leads to inequality is conditioned by what is understood by the very concept of equality; in one end of the spectrum are those scholars who support radical equality, of whom the most notable advocate is arguably Ferraz. By criticizing the Brazilian judiciary for granting access to medical treatment to privileged groups of society, he argues that that the courts should direct all enforcement of socioeconomic rights to the disadvantaged.[266] In the other end are those according to which adjudication should enable equal capabilities for all, even though disadvantaged groups might gain less overall.[267]

Despite the supposed transformative purpose of socioeconomic rights enforcement, the most radical theories of redistributive justice might nevertheless be too extreme: as noted by Langford the radical equality demand "risks ignoring the moderately poor, the working poor and the vulnerable working/middle class – even Marx did not ascribe to it"[268] More moderate theories, benefitting not only the most disadvantaged but also other groups of society, might thus be warranted. For example, social welfare regimes in the Nordic countries build upon o "social contract" between different groups of society.[269] Whereas the middle class pay higher levels of taxes, they mutually benefit from the running of efficient social services. Indeed, by excluding the middle class from the adjudication of socioeconomic rights, courts may risk losing their political legitimacy.[270]

Similarly, while the establishment of the Optional Protocol raised hopes for a more socially just society, it simultaneously raised questions relating to distributive justice.

[264] Langford, 2019, p. 128.
[265] Gauri & Brinks, 2014, p. 375,383, finding that although the Brazilian example points towards distributive bias in benefit of higher income groups, such alleged bias may be mitigated through indirect impacts on poorer groups of society, given that "the states stop opposing the claims and begin supplying the medication through the public health system".
[266] Ferraz, 2011 (a), p. 76.
[267] See generally, Sen 2009.
[268] Langford, 2019, p. 80, Landau & Dixon 2019, p. 118.
[269] See generally, Rothstein, 1998.
[270] *Ibid.*

Such concerns have been particularly pertinent in relation to the concept of non-retrogression. This may be explained by the frequent application by courts of negative injunction, *i.e.* the striking down of laws rather than issuing positive orders, in relation to the enforcement of socioeconomic rights.[271] By applying negative injunction, the judiciary does not have to examine questions of budgetary allocations or order the state to conform to a certain policy – merely, it has to assess whether the measures adopted were compatible with the Covenant. Since the judiciary does not have to address questions traditionally linked to the other branches of the state, negative injunction is perceived as relatively "court like", and thus preferred by judges.[272]

In light of the above, it may be concluded that judges are drawn towards the enforcement of individual claims, and claims involving negative obligations. In the context of the ICESRC, such a finding indicates that the Committee would be relatively more comfortable in finding a violation of retrogression-related complaints (involving active state interferences) compared to other complaints. This is problematic when considering that the middle and high income groups of society generally enjoy greater access to *e.g.* pensions and health care benefits, whereas the poorest groups only have a few, if any, benefits to cut from in the first place.[273] In times of economic distress, governments may thus feel compelled to reduce the benefits received by relatively advantageous individuals, in order to urgently reduce budget deficits or to redistribute resources to those in more urgent need. An overly rigid interpretation of the concept of non-retrogression might thus halt necessary government reforms, whereby the main beneficiaries remain far from those "most at the margins" as hoped for by justice Arbor.

In order to avoid the risks relating to distributive justice when adjudicating socioeconomic rights in general, and retrogression-related complaints in particular, the standard of review applied by the Committee may play a pivotal role. The underlying factors impacting the choice of review standards will thus be examined to the following.

271 Landau, 2012, p. 232.
272 *Ibid.*
273 *Ibid.,* p. 233.

4.3. Underlying factors informing the choice and application of review standards

The choice of review standard by courts and quasi-judicial bodies is impacted by several underlying factors. In some instances, however, the liberty of choice may be limited by an express provision, mandating the applicable standard of review. The manner in which such express standards are applied may nevertheless be influenced by how the directives contained in the relevant provision are interpreted in a particular context. Accordingly, while the Committee is mandated to review communications in light of the reasonableness review set in article 8 (4) of the Optional Protocol, the effectiveness and potential of the provision is greatly influenced by how the Committee chooses to apply the provision in a given communication.[274] The underlying factors informing the choice of review, and the application of an express standard in a specific case, is thus worth further examination.

The first factor impacting the choice and application of a standard of review, is the nature of the obligation under scrutiny; indeed, as noted earlier, courts are usually drawn towards stronger forms of review when confronted with negative as opposed to positive obligations. Indeed, the adjudication of complaints involving an active state interference depriving individuals of their existing access to socioeconomic rights is often perceived as less encroaching upon the powers of the democratically elected branches.[275] This, because it merely requires the court to assess whether the interference is justifiable, rather than to prescribe the state on matters of social and economic policy.[276]

The above tendency may be illustrated by the decision of the SACC in *Jaftha*, involving the deprivation of access to adequate housing.[277] In it, the court stated that "any measure which permits a person to be deprived of existing access to adequate housing" would be a limitation of the right to adequate housing.[278] In contrast to its previous case law, solely concerned with positive obligations, in *Jaftha,* the court adopted a distinctive model of review in relation to interferences of the duty to respect. Indeed, instead of considering

274 Porter, 2016, pp. 174, 200.
275 See *e.g.* Liebenberg 2010, pp. 54, 218, Young 2010, p. 413.
276 Liebenberg, 2010, p. 54.
277 CCSA, *Jaftha v. Schoeman and others; Van Rooyen v. Stoltz and others* (hereinafter *Jaftha*), CCT74/03, judgement of 8 October 2004.
278 *Jaftha,* para. 34.

the notions of reasonableness, resource constraints or progressive realization under section 26(2), as with previous cases, the court went on to consider the interference under the general limitations clause as set forth in section 36, thus subjecting the interference to close scrutiny.[279]

The decision in *Jaftha* thus demonstrates that the SACC will apply a different approach when confronted with a state interference depriving people of their existing access to socioeconomic rights, in contrast to when confronted with an failure by states to protect or fulfil rights.[280] Whereas interferences are subjected to a strict standard of review under the general limitations clause, omissions are evaluated through a relatively lenient form of review by allowing states a greater margin to rely on progressive realization within available resources. While this distinction may be warranted in respect of the separation of powers doctrine as noted above, it may nevertheless be problematic in terms of other considerations. As argued by Liebenberg:

> The stronger model of review applied to negative as opposed to positive duties suggest that in circumstances where people lack access to socio-economic resources and services, the State will be exposed to less robust forms of constitutional accountability.[281]

Accordingly, by subjecting interferences to a more stringent form of review than omissions, the above approach would seem to benefit individuals with prior access to socioeconomic rights, as opposed to individuals who lack access to said rights. Such an understanding would seem to conflict with the object and purpose of the ICESCR (*i.e* the establishment of clear obligations for State Parties, in order to achieve the full realization of socioeconomic rights),[282] particularly since, as noted above, most social rights are enjoyed by relatively advantaged groups of society. Arguably, the Covenant's object and purpose should not be understood solely in respect of a broader access to the rights by a

279 CCSA, *Jaftha*, paras. 35-51.
280 Liebenberg 2010, p. 218.
281 *Ibid.*
282 CESCR, General Comment No. 3, para. 9.

few, but also in respect of a broader number and wider range of beneficiaries.[283] The first concern thus relates to considerations of social justice.

A second concern relates to the (at least partly) artificial conceptual division between positive duties on the one hand and negative duties on the other. As discussed in chapter two, violations of socioeconomic rights often involve features of both infringements and omissions. Indeed, while the duty to respect will in most cases entail an obligation to refrain from taking certain action, it may also entail a positive obligation to ensure access to existing rights. The negative obligation not to interfere with the right to adequate housing, for example, is simultaneously linked to the positive obligation to provide alternative accommodation in the face of homelessness resulted by an eviction. Certain infringements may thus be framed both in terms of a negative duty not to interfere, and in terms of a positive duty by way of not taking a certain course of conduct.[284]

The third and final concern relates to the conception that refraining from action would require less from the state than actively pursuing to protect and fulfil socioeconomic rights, and thus be less restraining upon the other branches of the state. As noted by Koch, this might not be fully correct:

> For example, the interest of a State party in obtaining ownership of a certain residential property may be so great that the costs connected with abstaining from expropriation, i.e. showing *respect* for the right to private property exceeds those of *fulfilling* the right to housing by providing accommodation to the person or persons who becomes homeless as a consequence of the expropriation.[285]

The cost implications of non-interference may thus be substantial. This might be particularly true in relation to the concept of non-retrogression, where non-interference in the existing access to rights of some may incur significant costs for the state, thus

[283] See *e.g.* CCSA, *Grootboom,* para. 45: "Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses".
[284] In CCSA, *Grootboom*, for instance, the circumstances could arguably have been framed so as to have been focused on the eviction of the litigants thus concerning a negative duty, instead of the obligation of the state to protect the litigants' rights to housing.
[285] Koch, 2005, p. 92.

halting its potential endeavours to progressively develop the rights of others. [286] Since the framing of a case as involving either a positive or a negative duty may be the result of a rather arbitrary process – in combination with concerns relating to social justice and misconceptions relating to the cost implications of non-interference as per above – the choice of standard of review depending on the nature of the obligation, can only be partly correct. Other explanations are thus worth mentioning.

The second explanation behind the choice of review standards (and the application of provisions setting out express standards of review) relates to the maturity of the court; whereas courts with a less experienced jurisprudence tend to adopt deferential forms, more mature courts opt for more interventionist ones.[287] This would seem to concede with Tushnet's argument according to which weak courts tend to strengthen over time (and then reconvert back to weak ones).[288]

The third explanation relates to the nature of the relevant right. According to this view, a stronger form of review would be applicable to more measurable rights and objectives relating to commodities, such as food or water, whereas inherently complex rights and objectives, such as the right to health, would be subjected to weaker forms of review.[289]

Fourth, it has been argued that a stronger form of review would be more appropriate in cases where the court order entails insignificant cost implications for the state.[290] Such an explanation would seem to concede with the separation of powers argument, and cost-related objections by states in relation to the enforcement of socioeconomic rights compared to other rights. As discussed in the first chapter, however, assessing the empirical effects and costs of court decisions in the long term is not an easy endeavour.

The final factor impacting the choice and application of review standards is argued to be the seriousness of the infringement or omission at hand. In relation to proportionality analysis under the general limitations clause, Rivers argues that the intensity of the review

[286] See *e.g.*, IACHR, *Five Pensioners v. Peru,* as discussed in chapter 3.4.
[287] Young, 2010, p. 414.
[288] Tushnet, 2008, p. 43.
[289] Young, 2010, p. 415.
[290] *Ibid.*, pp. 415-416.

should be shifted in accordance with the seriousness of the infringement.[291] The question is, however, how one should define and determine seriousness? Here various options are available: on the one hand, seriousness could be measured in light of human dignity, equality and freedom, whereby the judicial body in question would most likely enter into a searching inquiry in order to strike a fair balance between interests of the rights-holder and the community as a whole. On the other hand, seriousness could be measured in terms of *e.g.* property-based rights, as a result of which the complaint would arguably be interpreted generously in favour of the individual. [292] Since such right are often perceived as more cognizable and "court-like" than concepts of human dignity and social justice, it appears likely that seriousness would be measured in light of, for instance, property-based considerations.[293] Such a finding is important since, as illustrated by the Latin American examples, an individual-centric enforcement of rights may risk entrenching the *status quo* by favouring more advantaged groups of society.

In light of the five explanations as examined above, it can be concluded that the choice and application of review standards should not be made solely on the basis of any of the explanations in a vacuum, for instance on the basis on whether the issue at hand concerns a negative or positive duty (although this consideration is arguably the most dominant), but rather on the basis of all relevant factors assessed as a whole. The next chapter in turn will examine the available standards of review to the Committee, and the rationale behind its choice of review.

4.4. The adjudication of individual complaints under the Optional Protocol to the ICESCR

4.4.1. Reasonableness review

In contrast to the other complaints procedures of the core human rights treaties within the United Nations system, the Optional Protocol to the ICESCR is provided with an express standard of review. It is provided by article 8 (4) and frequently referred to as 'the reasonableness review'. Article 8(4) reads as follows:

[291] Rivers, 2006, p. 176.
[292] Young, 2017, p. 27.
[293] See *e.g.* IACHR, *Five Pensioners v. Peru.*

> When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

In accordance with article 8(4), the Committee will thus assess the reasonableness of the steps taken by states (both forwards and back) to fulfil their Covenant obligations, which may be achieved by a number of 'policy measures'. The Committee must moreover interpret reasonableness in accordance with the general obligations of the Covenant, which it has indicated to do on the basis of its previous practice under the periodic state reporting process.[294] Importantly, when considering reasonableness, the Committee will not inquire whether other more favourable measures could have been adopted, but whether the measures in fact adopted are reasonable. States may thus meet their obligations through a range of possible measures.

The inclusion of an express standard of review, in its present wording, reflected the discomfort of some states concerning the adjudication of socioeconomic rights. Such discomfort was particularly related to the extent to which their budgetary choices would come under the Committee's scrutiny, and whether such scrutiny could lead to costly remedies.[295] Indeed, the drafting history of the Optional Protocol shows that the wording of article 8(4) was a result of heated debates, *e.g.* relating to the justiciability of positive obligations, the possibility of a so-called *á la carte* approach allowing states to choose the rights that would be made justiciable, as well as efforts to include an explicit margin of appreciation.[296] Ultimately, the efforts to undermine the effectiveness of the Optional Protocol were defeated by the compromise language of article 8(4), drawn almost verbatim from the approach taken by the SACC in *Grootboom*, arguably the most famous socioeconomic rights case adjudicated through reasonableness review by a national court.[297]

294 CECSR, 2007 statement, para. 2.
295 On the drafting history of article 8(4), see Porter 2014, pp. 5-16, and Griffey 2011 pp. 291-304.
296 See generally, Porter 2014, Griffey 2011.
297 CCSA, *Grootboom and* Others v. *the Government of the Republic of South Africa and Others* (Grootboom), judgement of 4 October 2000, CCT 11/00, para. 41.

The Committee applied the reasonableness standard in its first consideration of a communication on the merits under the Optional Protocol, *I.D.G v. Spain*.[298] In it, the Committee considered whether the author's right to adequate housing had been violated as a consequence of a mortgage enforcement process against her, allegedly since she had not been properly notified, and thus prevented from defending her housing rights under the Covenant. Indeed, the Committee noted that although attempts had been made to notify the claimant at her home, other measures had not been taken, such as leaving a note at her mailbox or with the caretaker.[299] The Committee thus concluded that the State Party had not taken all reasonable measures to adequately notify the claimant, and consequently, had prevented her from a proper defence.[300] Accordingly, by failing to fulfil the obligation of providing the author with an effective remedy, the State Party had violated the rights of the claimant under article 11(1) in conjunction with article 2(1).[301]

While the decision is significant in being the first communication considered under the Optional Protocol, and in highlighting the importance of procedural safeguards in terms of access to an effective remedy, it did little to reveal how the Committee would purport to consider reasonableness. Examining a more substantive description of the scope of the reasonableness review, found in a 2007 statement by the Committee, may thus be helpful. The statement was adopted during the negotiations of the Optional Protocol in order to "clarify how it might consider State parties' obligations under article 2(1) in the context of an individual communications procedure".[302] It included the following list of factors that it would potentially consider when assessing reasonableness:

> (a) the extent to which the measures taken were deliberate, concrete, and targeted towards the fulfilment of economic, social, and cultural rights; (b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner; (c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards; (d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights; (e) the time frame in which the steps were taken; (f) whether the steps had taken into account the precarious situation of

298 CESCR, *I.D.G v. Spain*, adoption of views 17 June 2015, Communication No. 2/2014.
299 *Ibid.*, para. 13.2-3.
300 CESCR, *I.D.G v. Spain*, para. 14.
301 *Ibid.*, para. 15.
302 CESCR, 2007 statement, para 3.

> disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.

The factors demonstrate considerable similarities between the approach of the Committee and the approach taken by the CCSA in *Grootboom*. Particular by stressing the prioritization of marginalized individuals or groups (f), the Committee echoed the language of the CCSA according to which "[t]hose whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right".[303] While the Committee is no way bound by the interpretation and application of reasonableness by the CCSA, no less should it ignore that the wording of the reasonableness standard in article 8(4), ultimately adopted as a compromise result, was strongly influenced by article 41 of the judgment. Arguably therefore, the approach of the CCSA, at least when it comes to *Grootboom*, should be given some value in interpreting how the reasonableness standard should be applied.

The relevance of the *Grooboom* decision for the application of the reasonableness review under the Optional Protocol may be narrowed down to two main considerations. On the one hand, the reasonableness standard of *Grootboom* is argued to be based upon the foundational value of human dignity.[304] Notably, the CCSA stressed the commitment to "transform our society into one in which there will be human dignity, freedom and equality…".[305] Accordingly, the court thus emphasized the transformative purpose of socioeconomic rights.[306] In light of the above, it has been argued that the Optional Protocol, in drawing considerate inspiration from the *Grootboom* decision, would similarly be characterized of a transformative object and purpose.[307] This would moreover be supported by the fact that the Committee, similar to the CCSA in

303 SACC, *Grootboom*, para. 44.
304 Porter, 2016, pp. 45-46. On the relevance of dignity in terms of the reasonableness review, see Liebenberg, 2005.
305 SACC, *Grootboom,* para. 25, citing SACC, *Soobramooney v. Minister of Health (Kwazulu-Natal)*, judgement of 27 November 1997, CCT 32/97, para. 8.
306 On the transformative purpose of socioeconomic rights in the South African context, see *e.g.* Klare, 1998, Liebenberg, 2009.
307 Porter, 2016, p. 200.

Grootboom, has highlighted the importance of prioritizing the needs of the marginalized.[308]

On the other hand, the *Grootboom* decision emphasized that reasonableness should be determined against the historical, economic and social context against which the claim arises.[309] As stated by Liebenberg, courts are enabled to adapt the stringency of their review standard "informed by factors such as the position of the claimant group in society, the nature of the resource or service claimed and the impact of the denial of access to the service or resource in question on the claimant group".[310] Read together, the reasonableness standard contained in article 8 (4) of the Optional Protocol should therefore be understood as both context-sensitive and flexible, while simultaneously shaped by considerations of human dignity.

The decision was moreover notable by its rejection of a "stand-alone" minimum core approach. Such an approach would have established an obligation for states to provide for a minimum threshold of socioeconomic rights, a standard which, as noted earlier, has been treated inconsistently by the Committee.[311] The CCSA did not, however, rule out the possibility of allowing the minimum core standard to guide its future application of the reasonableness review.[312] As noted by Young, the emphasize of the reasonableness review on the needs of the those in most dire need would seem to reflect the same focus on priority-setting as the minimum core approach, while simultaneously respecting the mandate of the other state branches.[313] Of this follows, that it might be advisable for the Committee to de-emphasize the role of the minimum core approach, while holding open the possibility of letting it guide its assessment of the reasonableness of steps taken, when deciding complaints under the Optional Protocol.

4.4.2. Proportionality analysis

Alongside reasonableness review, proportionality analysis represents the other major review standard for evaluating state compliance. It is often described as the most

308 CESCR, 2007 statement, para 3 (f), See further CESCR, *Djazia and Bellini*, para 17.5.
309 Grootboom, paras 43-44. See further, Porter 2009, p. 51.
310 Liebenberg 2010, p. 174.
311 See chapter 3.3.4.
312 SACC, *Grootboom*, paras. 31-33. See further, Forman, 2016.
313 Young, 2017, p. 12.

disciplined and structured standard for rights adjudication and enforcement.[314] A common feature of both standards is the rejection of more absolutist standards, such as the minimum core.[315] Despite the apparent advantages of the proportionality analysis, it has rarely been applied in relation to the adjudication of socioeconomic rights. [316] It is moreover unclear how the two standards, reasonableness and proportionality, relate to one another. As a consequence of the Optional Protocol, setting the applicable standard of the Committee to that of reasonableness, the question has become all the more pertinent. Thus, in order to understand how the Committee should approach when reviewing complaints concerning non-retrogression, one must first examine the question of proportionality.

Along the formulation of leading theorists on proportionality, the proportionality analysis is composed of the following questions.[317] First, did the interfering measure pursue a legitimate aim? Second, was there a rational connection between the measure and the achievement of the aim, in other words, was the policy suitable? Third, was the measure necessary in the sense that there did not exist less intrusive but equally effective alternative means? The most rigorous formulation of the test deems necessary an infringement only if there are no alternative, less restrictive means available. Fourth, are the costs imposed by the infringement on the rights-holder outweighed by the overall benefits of the measure? It is this final balancing stage, proportionality in the strict sense, or, the proportionality *principle,* that is at the heart of proportionality analysis.[318]

Indeed, it has been argued that while the structured test of the proportionality analysis might not have found its way into social rights adjudication, in contrast, the principle of proportionality may be understood as a subset of reasonableness.[319] As noted by Young "[t]he reasonableness standard, which directs attention to the gravity of the need, and the vulnerability of the rights-holder, makes proportionality – as principle, but not as a

[314] Möller 2012, p. 178.
[315] See generally, Young, 2008.
[316] Young, 2017, p. 13.
[317] Alexy, 2002, pp. 66-69, Kumm, 2007, pp. 131, 138-139.
[318] Möller 2012, p. 181, Young, 2017, p. 14.
[319] W. Sadurski, 2009, pp. 129, 133-134.

structured test – inseparable from reasonableness review."[320] In contrast, the proportionality analysis is mainly applied in regard of civil and political rights in their vertical dimension, *i.e.* between the state and private entities, in cases involving negative obligations.[321]

Möller argues that the asymmetrical application of the proportionality analysis in benefit of civil and political rights is explained by the fact that it would not make sense in relation to socioeconomic rights and positive obligations, since they require scarce resources for their realization. Thus, he argues, "any limitation [of socioeconomic rights] will always further the legitimate goal of saving resources and will always be suitable and necessary to the achievement of that goal."[322] According to him, the only meaningful inquiry would therefore be the final balancing stage in terms of the proportionality principle.[323] It should nevertheless be noted that article 4 of the ICECSR allows limitations solely for the purpose of promoting general welfare, which does not necessarily have to be identical with the goal of "saving resources". Moreover, reducing the benefits enjoyed by marginalized groups of society, for instance, in order to save resources, would generally not be considered necessary in the sense that there would not have been less restrictive means available, in order to achieve whatever aim that is argued to promote general welfare in the particular case.

It is nevertheless notable that the SSCA has refrained from adhering "mechanically to a sequential check-list" when applying proportionality under the limitations clause.[324] In relation to the necessity stage, for instance, the court has stated that when considering whether 'less restrictive means' would have been available, it shall not limit the government's range of legitimate legislative choice in a specific area.[325] By echoing the language of reasonableness, the court recognizes that such choices are influenced by *inter alia*, considerations of cost, priorities of social demand and conflicting interests.[326] As

320 Young 2017, p. 14.
321 Möller 2012, p. 176.
322 *Ibid.*
323 *Ibid.*
324 SACC, *S. v. Manamela and Another (Director-General of justice Intervening)* (hereinafter Manamela), judgement of 14 April 2000, CCT 25/99, para 32.
325 SACC, *Manamela*, para. 49.
326 *Ibid.*

discussed earlier in relation to the factors affecting the choice of review standards, the CCSA nevertheless applied the multi-pronged proportionality analysis in *Jaftha,* concerning the failure by the state to respect its negative obligations. The same approach is adopted by the European Court of Human Rights (ECtHR), which has applied a 'fair-balance' test in relation to the assessment of positive obligations, whereas the proportionality analysis has been reserved for the assessment of negative obligations.[327]

Prior to analysing the adjudication of retrogression-related complaints by the Committee in the final chapter of this thesis, it is helpful to first examine the relationship between reasonableness and proportionality, by way of a brief comparative exercise.

4.4.3. Reasonableness review and proportionality analysis: a comparison

Through their ability of balancing, albeit by differing methodologies, reasonableness review and proportionality analysis are both celebrated standards; reasonableness for its sensitivity for the contextual setting and considerations of human dignity, proportionality for its disciplined and sequenced structure. Their respective strengths may nevertheless constitute their greatest weaknesses – in a way, therefore, the two standards may be illustrated as opposites.

The first difference relates to the content of the right under adjudication; in proportionality, the claimant bears the burden of proving that an infringement has taken place, after which the burden of justification shifts to the state. In reasonableness, however, the two steps are integrated in a single context-driven inquiry. It has thus been argued to focus disproportionately on the justification of the state in relation to the impact of the deprivation of the right on the claimant, and thus to operate in "a normative vacuum".[328] In *Mazibuko*, for instance, the CCSA refused to consider the question of a minimum monthly quota of water, although the existing quota (8 kilolitres) was clearly insufficient.[329] A proportionality analysis, including an inquiry into whether less restrictive measures could have been adopted to achieve the aim of the state, *inter alia*,

327 See generally, Mowbray, 2010.
328 Liebenberg 2010, pp. 175-176.
329 SACC, *Mazibuko and Others v. City of Johannesburg and Others*, judgment of 2010.

the rehabilitation of the water network, might perhaps have changed the outcome of the case.[330]

The second and third differences relate to their structure, and approach to deference. Whereas the structure of proportionality analysis is generally formed by the four-step inquiry as described above, reasonableness review proceeds through a more holistic inquiry. While it may inquire into the same questions as proportionality analysis, it does so in a more *ad hoc*, than structured manner. Arguably, therefore, proportionality requires a more stringent justification by the state. Here lies the underlying factor to their differing approaches to deference: in reasonableness review, deference is seen as integrated in the one-part-inquiry, interpreted generously in relation to the state, as noted above. In proportionality analysis, however, the structured inquiry (*inter alia* whether the state could have adopted less restrictive means, or more rigorously even, whether it adopted the least restrictive means) may pose a risk of judicial usurpation, thus constituting a problem of separation of powers.[331] Accordingly, proportionality analysis, particularly in relation to positive obligations, may trigger a self-restraint in the form of deference on part of the court. As noted by Young "the general posture of deference, or margin of appreciation, immediately defeats the rigor (and consistency) of the inquiry in the first place".[332]

Addressing the relative weakness of the reasonableness review, and the risk of judicial abdication of the proportionality analysis, a compromise-solution has been presented: the proportionality-inflected reasonableness.[333] Indeed, it has been argued that this approach would have been adopted by the Committee, by way of its *Grootboom* inspired reasonableness standard as set in article 8 (4) of the Optional Protocol. The compromise-standard is, by and large, argued to be applicable in reviewing alleged violations of positive obligations. As noted earlier, however, retrogression-related complaints mainly implicate negative obligations in the form of active state interferences. Accordingly, while the standard of proportionality-inflected reasonableness might be helpful in finding

330 Young 2017, pp. 22, 29.
331 Contiades & Fotiadou, 2012, p. 668.
332 Young 2017, p. 25.
333 *Ibid.,* pp. 30-33.

the key to the adjudication of retrogression-related complaints, it may only be a partial solution.

In light of the above, the purpose of the final chapter is to examine the way in which the Committee should purport to interpret and apply the reasonableness standard of article 8 (4), and whether it should opt for a hybrid standard of review, as suggested by some commentators. In order to answer these, and related questions, it is necessary to first examine the relationship between such measures and formal limitations, in order to determine whether they could be considered in light of a unified approach.

5. The adjudication of retrogression-related complaints under the Optional Protocol to the ICESCR

5.1. The relationship between retrogressive measures and limitations: an inquiry

While seemingly straightforward, the relationship between retrogressive measures and formal limitations is largely unresolved. In determining whether the general limitations clause would enable the consideration of all types of alleged violations in the form of active infringements (including retrogressive measures), it must be interpreted "in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[334] In the absence of deliberation by the Committee, and as a supplementary means of interpretation, the ICESCR's drafting history and relevant scholarly work concerning the limitations clause and the scope of its application vis-à-vis article 2 (1), are examined to the following.[335]

Most notably, the *travaux préparatoires* elaborate on the question of scarce resources. Motivated by the fact that nonfulfillment on the basis of scarce resources was seen as a matter falling under article 2 (1), the *travaux* indicate, that the drafters did not allow the possibility to justify limitations in terms of article 4 based on insufficient available resources.[336] Instead, in line with other human rights treaties, limitations were regarded as necessary in order to balance the rights of the individual with the interests of the community, as well as to solve situations were two rights conflict with each other. A noteworthy passage from the *travaux* reveal the reasoning behind representatives that favoured the inclusion of a general limitations clause:

> …the provisions of Article 2 should relate only to the general level of attainment of rights and should not be invoked by States as grounds for imposing numerous limitations on them. Article 2 did not indicate when limitations could be legitimate, and it was necessary to state clearly that limitations would be permissible only in certain circumstances and under certain conditions[337]

[334] VCLT, general rule of interpretation, art. 31.
[335] VCLT, supplementary means of interpretation, art. 32, Statute of the International Court of Justice, article 38(d).
[336] See analysis of the *travaux préparatories* in relation to article 4 made by Alston & Quinn, 1987, pp. 194, 197, 205. See further: Müller 2008, pp. 569, 575, 585, Nolan et al 2014, p. 136, Young 2012, p. 107.
[337] Annotations on the text of the draft International Covenants on Human Rights, 1 July 1955, UN Doc. A/2929, para. 50.

The above statement may prove significant for the clarification of the relationship between article 2 (1) and 4. It has namely been understood to imply a distinction between limitations in terms of article 4 on the one hand, and a "general level of attainment" of rights, conditioned by the availability of resources, on the other. From such an assumption follows, that a resource-motivated reduction in the attainment of ESC rights would not seem to constitute a limitation in the sense of article 4.[338] Accordingly, a reduction in the enjoyment of ESC rights, or, a retrogressive measure, would not be synonymous to a formal limitation, and would thus not have to be justified in accordance with the general limitations clause. Given that the Committee has developed its doctrine on non-retrogression since 1991,[339] and continuously referred to it in both general comments and formal statements since, it would seem appropriate to assume that the Committee does in fact consider the two notions as separate, although it has yet failed to address their relationship. Indeed, according to some commentators, the above view would be shared by the Committee.[340]

In contrast to the view of the drafters, however, and presumably the Committee, some commentators insist that no distinction be made between retrogressive measures on the one hand and limitations *stricto sencu* on the other. Leckie, for instance, argues that a retrogressive measure, like any other active interference of the Covenant rights, would constitute a limitation, and thus a violation, if not duly justified with regard to the safeguards set forth by article 4.[341] Müller has similarly argued for the application of a single standard for the evaluation of all restrictions of ESC rights, whether retrogressive measures on the basis of insufficient resources, or limitations other than those relating to resource availability.[342] Additionally, Alston and Quinn note that the limitations clause was also intended for situations in which "the exigencies of state-administered socioeconomic welfare programs might necessitate limitations on the provision of benefits or other entitlements".[343] Due to the unclear reason why public welfare programs

[338] Alston & Quinn, 1987, p. 205.
[339] CESCR, General Comment No. 3, para 9.
[340] Müller, 2009, p. 575. Apart from the discussions referred to in the *travaux preparatoires*, the author does not, however, seem to elaborate further upon why the Committee would have taken such a view.
[341] Leckie, 1998, p. 99. For an opposite view, see Nolan *et. al.,* 2014, p. 136.
[342] Müller, 2009, p. 585.
[343] Alston & Quinn, 1987, p. 194.

would necessitate limitations, if not as a consequence of limited available resources (in which case the drafters purported limitations to be assessed under article 2(1)), this understanding of the purpose of article 4 would seem to support the application of single standard for assessing both types of active interferences of the Covenant rights.

Essentially, a unified standard is believed to be beneficial in order for states not to be able to circumvent their obligations by relying on a competing, weaker standard. By enjoying wider discretion in terms of article 2 (1) vis-á-vis article 4, they might attempt to avoid their obligations under article 4, instead invoking scarce resources under article 2 (1). Accordingly, it is not difficult to imagine situations where states would rely on the notion of progressive realization, in order to justify "any limitations on a *de facto* rather than *de jure* basis".[344] For instance, whereas a state would not be allowed under article 4 to allocate resources from Covenant related areas to an increased defence expenditure (without the burden of proving that this would be tantamount to promoting general welfare),[345] under article 2 (1), resource constraints as a consequence of an armed conflict might be regarded as a legitimate justification for the adoption of retrogressive measures. Indeed, in light of the Committee's 2007 statement, "serious claims on the State party's limited resources" might be held to justify retrogression, for instance when resulting from an armed conflict, natural disaster or a period of economic recession.[346]

The advocates of a unified approach are moreover motivated by the establishment of a clearer contextual relationship between article 2 (1) and 4.[347] This is supported by the fact that limitations in the form of active interferences with the obligation to respect, share significant similarities with the obligation not to take retrogressive measures. The two concepts appear to differ only in situations where a retrogressive measure does not constitute an active step back in existing levels of access to socioeconomic rights, but rather when a state omits to maintain current levels of rights enjoyment.[348] This might for

[344] Alston & Quinn, 1987, p. 205.
[345] See further, chapter 2.3.
[346] CESCR, 2007 Statement para 10 (c) and (d), see further, chapter 3.2.
[347] Müller, 2009, p. 585.
[348] From a conceptual point of view, such omissions would nevertheless concern the obligation to respect; indeed, as noted in chapter 2.1.2, the obligation to respect may, at times, require positive action for the maintenance of existing levels of rights.

instance occur when a states fails to allocate additional resources in order to maintain existing levels of access to social security benefits, in the context of inflation.[349] As noted by O'Conell et al.:

> "we conclude that the difference between the obligation to respect and the obligation not to take retrogressive measures essentially relates to the situation where a step backwards by the state (retrogression) does not interfere with the current enjoyment of the right (the obligation to respect). For example, a promise of funding that is subsequently withdrawn before it was actually allocated may constitute a retrogressive measure, but not a violation of the obligation to respect"[350]

Since the majority of retrogression-related complaints concern active state interferences, it would appear logical that the Committee should assess such complaints by applying the multi-sequenced proportionality analysis as provided for by the limitations clause.[351] As noted earlier, however, determining the applicable standard of review solely based on the legal nature of the relevant obligation might not always be fully rational. The often-misperceived conception of negative obligations being less financially restraining upon the state, might moreover disproportionately tip the scale in favour of applying the proportionality analysis. The adjudication of socioeconomic rights claims mainly through reasonableness review – particularly by the Committee, bound to do so under article 8 (4) of the Optional Protocol – would, of course, point to the contrary. It would moreover seem fair to say that most cases involving retrogression, for instance budgetary cuts in relation to social benefits or services, such as basic health care or primary education, do not constitute borderline cases, but clear interferences with the obligation to respect.

Some aspects of the unified approach might nevertheless give rise to concern. As discussed in earlier chapters, muscular standards for evaluating the compatibility of retrogressive measures might impede the ability of states to reallocate resources from those who are relatively well-off to those in need, particularly in times of severe resource constraints. Assessing retrogression-related complaints under article 4 might give rise to similar problems. Indeed, as noted in chapter two, it is generally understood that article 4 should be interpreted in restrictive terms. Moreover, it allows limitations to be justified

349 Nohlan & Dutschke, 2010, p. 5.
350 O'Connell et al., 2014, p. 92
351 ICESCR, article 4. See further chapter 4.4.2.

solely for the benefit of promoting 'general welfare'. As will be argued below, however, the general limitations clause might not be as restrictive as often perceived. In this regard, the notion of general welfare is worth further consideration.

The phrase is elaborated upon by the Limburg principles, according to which it shall be understood to mean "furthering the well-being of the people as a whole".[352] The question is therefore, how 'well-being' should be understood? Some guidance may be drawn from research made in relation to article 29 of the Universal Declaration of Human Rights (UDHR), upon which article 4 of the ICESCR is based.[353] In the context of the UDHR, general welfare has been understood as referring to the "economic and social well-being of the community",[354] the purpose of which seems to be promoting the "dignity and well-being" of the individual.[355] Read together with the interpretation of the Limburg principles, general welfare might thus be understood to justify limitations for the purposes of furthering the socioeconomic well-being and dignity of the population as a whole. When construed in broad terms as per above, the requirement of 'general welfare' would arguably not pose an overly rigorous burden upon states seeking to justify retrogressive measures under the general limitations clause in order to, for instance, redirect resources for the protection of individuals or groups in more need.

As has been examined above, the differences between retrogressive measures and limitations are arguably slight. States are thus likely to frame their (in)action so as to fall under the more lenient standard applied in relation to article 2(1), whereby article 4 risks losing its "teeth". It would moreover appear practically impossible for the Committee to clearly distinguish between retrogressive measures taken as a consequence of scarce resources on the one hand, and limitations on the basis of other grounds (linked to the requirement of 'general welfare') on the other.[356] It would thereby seem logical to abandon the distinction made between retrogressive measures and formal limitations, and

352 Limburg principles, principle 52.
353 Alston & Quinn, 1987, p. 198.
354 The Individuals Duties to the Community and the Limitations of Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights, prepared by Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, Erica-Irene Daes, 1983, E/CN.4/Sub.2/432/Rev.2, at 1018.
355 *Ibid.,* at 250.
356 Müller, 2009, p. 585.

to instead review all active infringements of the Covenant rights in light of the criteria set forth by the general limitations clause.

Equating retrogressive measures with limitations, and reviewing them under a unified standard would, however, entail de-emphasizing the doctrine on non-retrogression in the context of the individual complaints procedure. While arguments have been forwarded to this effect,[357] it would admittedly be problematic by countering the praxis of the Committee, developed since the adoption of General Comment No. 3 in 1990. It is thus worth examining whether such a "reform" could in fact be supported in terms of the object and purpose of the Optional Protocol.

5.2. The concept of non-retrogression and the individual and collective dimensions of socioeconomic rights enforcement

In determining whether the concept of non-retrogression is applicable in relation to the individual complaints procedure, it is helpful to examine the context in which the standard was adopted. As noted earlier, until the entry into force of the Optional Protocol in 2013, the Committee only operated through its monitoring mechanism in the context of state reporting processes. The standards of progressive realization and non-retrogression were therefore adopted primarily for purposes of monitoring, rather than adjudication. As examined below, this simple observation might have far-reaching consequences for the future adjudication of retrogression-related complaints under the Optional Protocol. Melish, for instance, argues that the standards of progressivity/non-retrogression should be abandoned in individual complaints procedures. She notes that:

> These concepts, as measures of results-based achievement over the sum of the population, are inappropriate as juridical standards in individual contentious processes, particularly at the supranational level, where justiciability requirements such as causation and demonstrable injury to duly-identified persons are key.[358]

The above critique may be boiled down to two main arguments. The first one relates to the Committee's varying application of the state obligations flowing from the ICESCR

[357] See *e.g.,* Landau 2012, p. 240, Melish 2005, p. 63, Dowell-Jones 2004, pp. 52-54.
[358] Melish, 2005, p. 52.

depending on the enforcement mechanisms it is operating through. Indeed, when issuing views on individual complaints in its capacity as quasi-judicial organ (*i.e.,* the individual dimension of socioeconomic rights enforcement), the Committee is argued to apply the tripartite typology of the obligations respect, protect and fulfil. By contrast, in relation to periodic state reporting processes in its capacity as a monitoring organ (*i.e.,* the collective dimension), it is instead argued to apply the concept of progressive realization.[359] This individual/collective dichotomy suggests that states have both obligations to respect, protect and fulfil the rights of particular individuals and groups of individuals, as well as broader obligations to progressively ensure a greater access to the Covenant rights in respect of the entire population.[360] State Parties are thus required to adopt reasonable public policies, and to make sure that any retrogressive measures in this respect are duly justified. Most notably, any such overall retrogression would be assessed by way of the collective standards of progressive realization/non-retrogression.

Applying collective standards in relation to individual contentious processes would, however, seem to nullify the very concept of progressive realization. Indeed, it would appear to expose the Committee to situations where a particular individual or group of individuals would argue that retrogressive measures adopted by the state amounts to a violation of the obligation to progressive realize the relevant rights. This, even if such measures were adopted to achieve general progress with regard to the entire population, or indeed for the protection of the rights of particularly disadvantaged groups of society. Applying the concept of non-retrogression to individual complaints would, therefore, risk entrenching the *status quo* – in the name of human rights. Such an interpretation would arguably obscure what is argued to be the over-riding interpretative framework of the Optional Protocol, i.e. the transformative dimension of the reasonableness standard in article 8(4).[361]

[359] Melish, 2005, pp. 61-62.
[360] Arguably, adopted one year prior to the Optional Protocol, the 2012-letter constitutes the most comprehensive description of how such an assessment would take shape. As noted earlier, however, the Committee may nevertheless draw guidance from it, and other instruments adopted primarily for monitoring purposes, when adjudicating complaints under the Optional Protocol.
[361] Porter, 2014, p. 29.

The second argument relates to the division of the Covenant obligations into obligations of conduct and obligations of result. As noted in chapter two, the former obliges states to undertake certain measures in pursuit of a given result, whereas the latter obliges states to achieve a certain outcome, irrespective of the form of conduct. While both dimensions are mutually inclusive and apply to all human rights, it has nevertheless been purported that only the latter would be directly justiciable in relation to individual complaints filed under the Optional Protocol.[362] This is argued to follow from the fact that assessing state conduct in individual contentious processes requires evidence over the existence of three elements: a *causal link* between the *concrete injury* suffered by the complainant and the *conduct of the state* by way of an act or an omission. Indeed, except for rare provisions obliging states to take certain measures (in particular the imperative yet vague obligation of 'taking steps' towards the full realization of Covenant rights), the Covenant does not impose specific obligations of conduct.[363] Due to the inability of the concept of progressive realization to prove *causation,* it has been argued to be non-justiciable in terms of individual complaints under the Optional Protocol.[364]

Of the above follows that while the concept of non-retrogression is, and should be, applied in relation to periodic state reporting processes, it would be advisable to de-emphasize it when assessing retrogressive measures in relation to individual claims. De-emphasizing the concept of non-retrogression would similarly be supported by several factors discussed in earlier chapters, particularly in relation to distributive justice. Instead, the Committee should focus on the tripartite typology, and assess the compatibility of retrogressive measures in light of the criteria set by article 4. With that said, the limitations clause must not be interpreted and applied so as to obscure the well-being and dignity of the rights-holder vis-á-vis the sum of the population. In the following sub-chapter, I will therefore re-examine the standards of review as available to the Committee, in order to find the optional balance for the adjudicating of retrogression-related complaints under the Optional Protocol.

362 Melish, 2005, p. 64.
363 De Schutter, 2019, p. 566.
364 Melish, 2005, p. 64.

5.3. Reasonableness-inflected proportionality

While it has been argued that the Committee should review all active interferences of the Covenant rights under the proportionality analysis (through the general limitations clause), it must do so while simultaneously considering the reasonableness of the steps taken, as conditioned by article 8 (4) of the Optional Protocol. As noted earlier, some commentators advocate for the application of a proportionality-inflected reasonableness, when considering complaints involving positive obligations.[365] The proportionality-inflected reasonableness, or alternatively the "pure" reasonableness review, would thus appear applicable whenever a retrogressive-related complaint involves an alleged failure by the state to take positive action in order to maintain existing levels of access to the Covenant rights.[366] As discussed earlier, however, the majority of complaints involving retrogressive measures concern situations in which the state has, in fact, actively interfered with the relevant rights. Against this background, it will be suggested that retrogression-related complaints should generally be reviewed under a standard of 'reasonableness-inflected proportionality'.

In light of the reasonableness-inflected proportionality, the Committee should apply the four-step inquiry into the aims, suitability, necessity, and proportionality in the strict sense, as a basis for assessing (active) retrogression-related complaints under the Optional Protocol. Indeed, reflecting the step of necessity, the Committee has stated that it will consider "whether the State party adopts the option that least restricts the Covenant rights" when determining the reasonableness of the steps taken. [367] Importantly, however, the wording of article 8 (4) allows states to adopt "a range of possible policy measures" in order to implement the Covenant rights. Of this follows, that the Committee should generally not inquire into whether other more favorable measures could have been adopted, or whether public resources could have been better allocated; rather, it should determine whether the adopted measures were, in fact, reasonable.[368] Requiring states to have adopted the *least* restrictive alternative in order the be compliant with the Covenant, would therefore appear inconsistent with the above.

[365] See further, chapter 4.4.3.
[366] It would not appear to be meaningful to review state inaction in light of article 4, for instance, since it would generally not pass the initial test of "determined by law".
[367] CESCR, 2007 statement, para. 3.
[368] See, CCSA, *Grootboom*, para. 41.

Allowing states to choose between a range of alternatives does not, however, entail a *carte blanche* for states to arbitrarily choose whatever measure they deem fit.[369] As consistently noted by the Committee, the margin of discretion enjoyed by states in assessing the most feasible measure to implement the relevant rights, should not be interpreted as a pretext for non-compliance.[370] Article 8 (4) thus allows states to choose between a range of policy measures *in compliance* with the Covenant.[371] In assessing whether an active interference is, indeed, compliant, and thereby reasonable, the Committee would arguably have to consider whether *less* restrictive, albeit equally effective means, would have been available to ensure the Covenant rights. Moreover, since the Committee would not have to consider questions of resource allocation (compared to if it were to assess complaints involving state inaction), such an inquiry would not appear to constitute an issue from the viewpoint of the separation of powers doctrine.

The important question to be answered is, therefore, how reasonableness should be read in within the proportionality analysis? Again, the circumstances under which article 8(4) was adopted, notably influenced by the *Grootboom* decision, should inform the interpretation and application of the reasonableness review. Indeed, notions of human dignity and context-sensitivity should play a key role, thus allowing to factor in considerations such as the claimant's position in society and the impact of the deprivation on the claimant.[372] Such considerations should inform the Committee's assessment of the first prong of the final stage of proportionality analysis (proportionality in the strict sense), *i.e.* the infringement on the rights holder, when aiming to strike a fair balance between the interests of the claimant and the state. If the claimant belongs to more

[369] The determination of whether appropriate measures have been adopted shall ultimately be made by the Committee, see, CESCR, General Comment No. 3, para 4.
[370] CESCR, General Comment No. 12, para. 21; CESCR, General Comment No. 14, para. 53; CESCR, General Comment No. 15, para. 45; CESCR, General Comment No. 16 para. 32; CESCR, General Comment No. 17, para. 47, CESCR, General Comment No. 19, para. 37; CESCR, General Comment 19, para. 66.
[371] Griffey, 2011, p. 290.
[372] See further, chapter 4.4.1.

advantageous groups of society, it may be assumed that, *ceteris paribus*, the infringement is relatively less constraining than it would be on a person belonging to "the margins".[373]

The assessment of the other prong of the proportionality in the strict sense, *i.e*. the overall benefits of the measure, will similarly have to be made in light of the context. As noted earlier, limitations may be justified solely for the purpose of general welfare, argued in this thesis to conform with the socioeconomic well-being and dignity of the people as a whole. Accordingly, if retrogression is resorted to as a necessary measure for the purpose of achieving general welfare in terms of the definition above, proportionality in the strict sense should be given an interpretation generous to the government. This would for instance be the case in the context of increasing access of a right to both a larger number and a wider range of people.[374] Indeed, when assessing the reasonableness of the steps taken (backwards) within the proportionality analysis, the Committee would need to factor in not only the impact of the infringement on the rights-holder, but also any increasing coverage and reducing inequalities in the access of the right under assessment, in relation to the population as a whole.[375]

With that said, assessing the reasonableness of any retrogressive steps would arguably have to be made in relation to particular individuals, or group of individuals, rather than in relation to the population in its entirety. As discussed in chapter 3.4, any interpretation to the contrary would obscure the equal protection of human rights towards everyone, irrespective of social background. In other words, the state is obliged to justify any retrogression taken in relation to a particular claimant, even when an increased overall enjoyment is demonstrable. While an increasing coverage should not affect the standing of a claimant, it should certainly be factored in at the merits stage.

The concerns related to proportionality analysis, discussed in chapter 4, are also worth addressing. As noted earlier, the proportionality analysis is feared to cause self-restraint on part of courts, particularly when applied in relation to socioeconomic rights. This

[373] See statement by Justice Louise Arbor 'Freedom from Want – From Charity to Entitlement', La Fontaine-Baldwin Lecture, 2005. See further, chapter 4.2.
[374] SACC, *Grootboom*, para. 45.
[375] Melish, 2005, p. 63.

would not, however, seem to materialize in relation to the adjudication of retrogression-related complaints; indeed, by mainly implicating the obligation to respect (in its negative dimension), the enforcement retrogression-related complaints will generally be perceived as less encroaching upon the powers of the elected branches, compared to complaints involving obligations to protect or fulfil. Of this follows, that the application of the proportionality analysis would generally not lead to deference on part of the Committee, particularly when inflected with the more context-sensitive standard of reasonableness.

Finally, provided that the complaint passes the prior stages of the proportionality analysis, the Committee would need to consider whether the overall benefits outweigh the impact on the rights-holder, influenced by considerations as per above. Lying at the heart of reasonableness, the needs of the disadvantaged must be accorded special attention. In the context of social reforms, the Committee should thus accord due weight to the overall progress made by the State Party in relation to socioeconomic rights protection, particularly when achieved in respect to marginalized groups. The reasonableness-inflected proportionality analysis may thus provide the key for a more socially just adjudication of retrogression-related complaints under the Optional Protocol.

6. Conclusion

The present thesis has examined the adjudicating of retrogression-related complaints under the Optional Protocol to the ICESCR. This, since the question of how such complaints should be assessed by the Committee in the light of the reasonableness standard as set in article 8 (4) of the Optional Protocol has received only little attention. It was noted that although the ICESCR includes a general limitations clause in article 4, the Committee has rarely applied it in practice; instead, it has appeared to develop a doctrine on non-retrogression in the light of which 'retrogressive measures' are assessed. Attention was moreover drawn to the unclear normative content of the concept of non-retrogression, and the unestablished relationship between retrogressive measures and formal limitations, whereby the adjudication of socioeconomic rights has been rendered challenging. Accordingly, this thesis has sought to answer these, and related questions, in order to provide the Committee with a model for adjudicating retrogression-related complaints under the Optional Protocol

In the second chapter of this thesis, I have sought to clarify the content and scope of the state obligations stemming from the Covenant. As such, I have first examined the nature of said obligations in the light of three categorizations: negative and positive obligations, obligations of respect, protect and fulfil, and obligations of conduct and result. An overview of the main obligations-related provisions of the Covenant was moreover provided, in the context of which it was noted that the concept of non-retrogression may be viewed as the natural corollary to the concept of progressive realization. Accordingly, by undertaking to progressively realize the Covenant rights, states simultaneously undertake not to reduce already achieved levels of access to them. While the Committee has regrettably failed to clarify the actual meaning of a 'retrogressive measure', it has been defined by Sepúlveda as "any measure that implies a step back in the level of protection accorded to the rights contained in the Covenant which is the consequence of an intentional decision by the State".[376] It was noted that while the majority of retrogression-related complaints concern active state interferences, they may also involve a failure by the state to take positive action in order to maintain existing levels of access to rights.

[376] Sepulveda, 2003, p. 323.

In chapter three, it was stressed that the concept of non-retrogression does not impose an absolute bar against adopting retrogressive measures. It was nevertheless noted that their compatibility will be reviewed under a particularly strong from of scrutiny. Having considered the challenges experienced by the Committee in interpreting and applying the concept of non-retrogression, I have thus sought to outline the circumstances under which retrogressive measures may be considered justifiable. Notably, in its most recent position on non-retrogression, the Committee has held that "any policy change or adjustment" should be temporary; necessary and proportionate; non-discriminate and, identify and protect the minimum core. The guiding effect of at least some of the criteria was, however, considered to be hampered by their ambiguous scope and content. Thus, instead of assessing the criteria in a vacuum, it was suggested that they be considered in the light of an overall assessment of the reasonableness of the steps taken.

In determining the viewpoint from which retrogressive measures should be scrutinized, it was suggested that their compatibility should be reviewed in relation to a particular individual or group of individuals, rather than in relation to the population as a whole. As such, it was noted that an interpretation to the contrary would appear to counter the equal protection of human rights to each individual and group, irrespective of socioeconomic background. Of this follows, that a State Party would have to justify any retrogression in relation to an individual claimant, even in situations where an overall increase in the access to socioeconomic rights in respect of the entire population could be demonstrated. On the other hand, it was noted that an individual-centred adjudication of retrogression-related complaints may be linked to concerns of distributive bias.

Indeed, with a particular focus on questions of social justice, in chapter 4, I have examined the judicial enforcement of socioeconomic rights. Building upon the work of Tushnet, it was argued that the protection of socioeconomic rights is generally fostered by relatively weak, as opposed to strong forms of standards of review. In particular, it was noted that an overly rigid application of the concept of non-retrogression may be viewed as a separation of powers issue, potentially compromising the legitimacy of the Committee. It was moreover noted that a muscular application of the concept of non-retrogression might

lead to a middle-class bias by obstructing the possibilities of states to redistribute resources to poorer groups of society. As the Latin American examples suggested, such distributive concerns are particularly acute, since judges are more comfortable with the enforcement of individual claims, and claims involving negative obligations. This, in combination with the fact that advantageous groups of society often reach the courts with relative ease, and because such groups have relatively more benefits to cut from in the first place.

With this in mind, in chapter five I have sought to determine how the Committee should purport to adjudicate retrogression-related complaints under the Optional Protocol. First, I examined the relationship between retrogressive measures in terms of article 2 (1) and limitations in terms of article 4. Notably, the obligation not to take retrogressive measures appears to differ from the obligation to respect solely when such measures do not constitute active steps backwards in achieved levels of rights enjoyment, but on the contrary, when states fail to take necessary measures to maintain existing levels of access to them. However, since the majority of retrogressive measures do, in fact, concern active interferences, the differences between the two concepts are arguably slight. Accordingly, it was suggested that all active interferences, including both formal limitations and retrogressive measures, should be reviewed through a unified approach under the criteria provided by the general limitations clause. It was suggested that the criteria of "general welfare", contained therein, should be interpreted in broad terms, in order not to pose an overly rigorous burden upon stats seeking to justify retrogressive measures on legitimate grounds.

Second, I examined whether a unified approach could be supported by the purportedly transformative purpose of the reasonableness standard in article 8 (4) of the Optional Protocol. It was argued that by applying the concepts of progressive realization and non-retrogression to individual contentious processes, the Committee would risk turning them on their head. Moreover, it was noted that by reflecting result-based obligations over the sum of the population, they might not be able to prove causation between the concrete injury suffered by the complainant as a consequence of the state conduct. Accordingly, it

was suggested that the concept of non-retrogression should be de-emphasized in relation to the individual complaints procedure of the Committee.

Finally, I have sought to determine a model for the Committee through which it might adjudicate individual complaints involving active state interferences. Crucially, it was pointed out that the Committee must review all complaints under the reasonableness standard as set forth by article 8 (4) of the Optional Protocol. However, since retrogressive measures in the form of active interferences greatly resemble formal limitations – and because limitations are generally reviewed under the proportionality analysis – it was suggested that the two standards be merged, and that active retrogression-related complaints be scrutinized through a standard of reasonableness-inflected proportionality. The criteria of the limitations clause and the proportionality analysis attached therein would thus provide for the basic structure for the assessment of retrogressive measures, whereas the compatibility of the steps taken would have to be considered in the light of the transformative objective of the reasonableness standard in article 8 (4). This would place retrogressive measures under a strong form of scrutiny, while enabling the Committee to consider contextual factors such as the claimant's socioeconomic situation, and the impact of the deprivation on him or her. As such, the reasonableness-inflected proportionality analysis might thus allow the Committee to deliver an optimal balance between the rights of the individual, and the rights of the population as a whole.

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